Jurisdictional Statement

81-341

No.

Office-Supreme Court, U.S.
FILED
AUG 17 1981
ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

LINNIE LINDSEY,
BARBARA HODGENS and
PAMELA RAY - - - - - - Appellees

versus

JOSEPH GREENE and
UNKNOWN DEPUTY SHERIFFS - - Appellants

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

This appeal presents the single issue of the constitutionality of Ky. Rev. Stat. 454.030 which allows constructive service of process by posting in forcible entry and detainer actions.

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APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JURISDICTIONAL STATEMENT

Come the Appellants, by Counsel, pursuant to Rule 12 of the Rules of the Supreme Court of the United States, and submit the following Jurisdictional Statement.

1.(a) This appeal presents the single issue of the constitutionality of Ky. Rev. Stat. 454.030 which allows constructive service of process by posting in forcible entry and detainer actions.

(b) LINNIE LINDSEY and BARBARA HODGENS and PAMELA RAY, on behalf of themselves and all other persons similarly situated;
LOUISVILLE WELFARE COUNSELING STOREFRONT, INC., a non-profit corporation, on behalf of all its members; and RUTH ARMSTRONG, individually and on behalf of public housing tenants,

and on behalf of all others similarly situated, and as acting president of the LOUISVILLE WELFARE COUNSELING STOREFRONT, INC., AND THE LOUISVILLE WELFARE RIGHTS ORGANIZATION; TENANTS UNION, INC., a non-profit Kentucky corporation, on behalf of all its members, by and through its Coordinator, CAROL THOMAS

Plaintiffs

vs

THE HOUSING AUTHORITY OF LOUISVILLE; DONALD L. HARRIS, Executive Director of the Housing Authority of Louisville; D. W. BEARD, Administrator of Community Development of the Housing Authority of Louisville; and HARRY W. TODD, Development Manager of Parkway Place Project of the Housing Authority of Louisville; and LAWRENCE THOMAS, Development Manager of Clarksdale Project of the Housing Authority of Louisville; S. CARTER BEARDEN, Deputy Sheriff; JOSEPH GREENE, Sheriff, and UNKNOWN DEPUTY SHERIFFS

Defendants

(d) This case arises from the following lower Court decisions: 1) Summary Judgment was granted the Appellants in the United States District Court for the Western District of Kentucky, civil action No. C-75-0387-L(A) on May 18, 1979; thereafter the District Court judgment was reversed by the United States Court of Appeals for the Sixth Circuit, file number 79-3477, on May 18, 1981.

(e)(i) This proceeding is on appeal from the decision of the United States Court of Appeals for the Sixth Circuit declaring Kentucky Revised Statute 454.030 unconstitutional. The statutory basis for the federal jurisdiction is 28 U.S.C. Sections 1331, 1337, and 1343.

(ii) The judgment appealed from was entered on May 18, 1981. The notice of appeal was filed on July 6, 1981, in the United States Court of Appeals for the Sixth Circuit.

(iii) The Supreme Court of the United States has jurisdiction of this appeal based on 28 U.S.C. 1254(2).

(f) The Kentucky statutory provision this case involves is Ky. Rev. Stat. §454.030, which states:

> If the officer directed to serve notice on the defendant in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the defendant's family thereon over sixteen years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court.

(g) Statement of the case. The case involves the use of constructive service of process to notify tenants of a Louisville public housing project that a writ of forcible entry and detainer had been filed against them in state court. The notice was usually posted on the apartment door of the apartment the tenant occupied

if service was made while the tenant was absent from the apartment or refused to answer. The tenants allege this manner of notice was a violation of the notice requirement of the Due Process Clause. The issue was first raised in District Court on a Motion for Summary Judgment by the tenants and then on a Motion for Summary Judgment by the Defendants which was granted to the Defendants. The exact issue was raised on appeal to the Sixth Circuit Court of Appeals which reversed the District Court Judgment by finding the state statute violative of the Due Process Clause.

(h) The precise issue presented in the appeal is substantial as to require plenary consideration because of the need of an efficient and effective manner for adjudicating forcible entry and detainer actions. The present Kentucky statute which was ruled unconstitutional afforded the Louisville Housing Authority and all like proprietors a fair and effective means of accomplishing a prompt adjudication of landlord-tenant disputes. The inability of a landlord to use the Kentucky posting will allow an experienced process dodger to remain immune from the legal reach of the Court system, thus depriving the landlord of a fundamental right to rents and profits from the dwelling.

The Sixth Circuit Court of Appeals ruled that Ky. Rev. Stat. §454.030 was unconstitutional or violative of Appellee's Due Process right of nature, thereby

explicitly overruling *Weber* v. *Grande Lodge of Kentucky,* 169 F. 522 (6th Cir.), cert. denied, 215 U. S. 606 (1909).

The Sixth Circuit overruled *Weber* on the assertion that the doctrinal framework underlying that decision had been overruled by the Supreme Court in *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306 (1950); and *Shaffer* v. *Heitner,* 433 U. S. 186 (1977). The *Weber* decision was a forcible entry and detainer action over possession of a building in Louisville leased by out-of-state residents. Notice of the action was by posting, just as in the present case. The foundation of the *Weber* decision was based on the Supreme Court's ruling in *Pennoyer* v. *Neff,* 95 U. S. 714 (1877), which provided that *in rem* jurisdiction over a *res* required only the posting of notice of a judicial suit on the property. The theory was based on the concept that the seizure of property constitutes notice to the owner or possessor.

The Appellants believe the Sixth Circuit's reliance on *Shaffer* and *International Shoe, supra,* is misplaced. These cases dealt with *quasi in rem* actions, that is the property or tangible items itself, the *res* is not the object of the litigation, but was seized as a means of satisfying a possible judgment against the defendant whom *in personam* jurisdiction could not be obtained. The *Shaffer* Court formulated the now famous "minimum contacts" tests for obtaining *quasi in rem* jurisdiction over a defendant. The test requires that such minimum contacts exists that *in personam* jurisdic-

tion over the defendant could be exercised under *International Shoe*. The practical effect of *Shaffer* was to eliminate pure *quasi in rem* proceedings to acquire jurisdiction for a possible judgment when *in personam* jurisdiction could not be obtained. There is no question that Kentucky has *in personam* jurisdiction over the Appellees in the present case; and the sole issue to be decided is whether Ky. Rev. Stat. §454.300 comports with doctrine enunciated in *Mullane, supra.*

In *Mullane* the Supreme Court addressed the constitutional sufficiency of publication notice rather than mailed individual notice to known beneficiaries of a common trust fund as part of a judicial settlement.

The Court observed that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process. It further stated that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." 339 U. S. at 314, 315.

The Court then held that publication notice could not satisfy due process where the names and addresses

of the beneficiaries were known. In such cases, the reasons disappear for resort to means less likely than the mails to apprise them of an action's pendency.

The *Mullane* case thus specifically held notice by publication when the names and addresses are known does not comport with the notice requirement of the Due Process Clause. Such is not the issue in the present appeal, notice has never been effected by publication in the newspapers and the Appellants must emphasize that "posting" is used as a method of service only as a last resort. The officer of the Court who serve summons in forcible entry and detainer actions first attempt to serve the defendant personally, and second, they attempt service by leaving the summons with a member of the defendant's family who is over sixteen (16) years of age. Appellants believe the Kentucky statute falls within the guidelines set out in *Mullane;* that is, the statute is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.

In *Weber, supra,* the Court addressed the reasonableness of the method of notice and stated:

> The particular case we have before us, that of a tenant holding over after expiration of his term, seems to present no serious question as to the reasonableness of the manner of giving notice or the time for an appearance. There is nothing unreasonable in presuming that such a tenant would receive information by notice posted on the doors of the premises in dispute within the time he was required to appear. (169 Fed. at page 528)

In *Sullivan* v. *Choquette,* 420 F. 2d 674 (1st Cir., 1969); certiorari denied 90 S. Ct. 1691, 398 U. S. 904, 26 L. Ed. 2d 62; rehearing denied, 90 S. Ct. 2237, 399 U. S. 938, 26 L. Ed. 2d 809; the Court stated:

> In actions concerning rights in property, within the state, due process requires only that reasonable notice and an opportunity to be heard be afforded. *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); F. James, Civil Procedure §§12.1, 12.7, 12.11 (1965) Restatement of Judgments §32, comments a, f, and g (1942); see Wagner v. Wagner, 110 U. S. App. D.C. 345, 293 F. 2d 533 (1961); *Schulte* v. *Walker,* 130 F. 2d 907 (7th Cir. 1942). (420 F. 2d at Page 676)

In *Velazquez* v. *Thompson,* 451 F. 2d 202 (1971), the plaintiffs, who were all New York City apartment dwellers who were evicted from their apartments because of non-payment of rent, challenged the statutory scheme for summary eviction. The New York statute is quite similar to the statute herein and the court found that it "clearly complie[d] with due process requirements." (491 F. 2d at page 204)

The *Velazquez* case, *supra,* was cited with approval by the District of Columbia Court of Appeals in *Westmoreland* v. *Weaver Brothers, Inc.,* 293 A. 2d 506 (1972), wherein the Court stated:

> *We also disagree with appellants contention that service by posting violated constitutional due process requirements.* The adequacy of notice for due process purposes depends on whether it is

> "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank and Trust Company,* 339 U. S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). In a landlord-tenant action for possession of premises '[i]t is to be noted initially that since this is an action to recover the possession of premises occupied by a person who is resisting removal, his whereabouts are obviously fixed and easily determinable. Thus the usual problem of serving a person whose present residence is unknown, which gives rise to much of the constitutional litigation . . . is absent.' *Velazquez* v. *Thompson,* 451 F. 2d 202, 205 (2d Cir. 1971) In such a suit, we cannot say that service by posting is not reasonably calculated to give the tenant notice of the pending action and therefore there is no constitutional infirmity. (295 A. 2d at pages 509-510) (emphasis added)

The Sixth Circuit in holding Ky. Rev. Stat. §454.-030 unconstitutional placed great emphasis on the belief that some of the posted notices would be removed before the tenant returned home; thus making actual notice a requirement of *Mullane.* The fact of actual notice is irrelevant to the question before the Court because the test under the Due Process Clause as to the validity of notice is not whether the defendant actually receives notice, but rather whether the method used is one reasonably calculated to give actual notice.

The Appellants submit the test is more than met and pray for a reversal of the Sixth Circuit decision declaring Ky. Rev. Stat. §454.030 unconstitutional.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 75-0387 L(A)

LINNIE LINDSEY, et al. - - - - - *Plaintiffs*

v.

HOUSING AUTHORITY OF LOUISVILLE, et al. - *Defendants*

SUMMARY JUDGMENT—Entered May 18, 1979

This action, having come on for decision upon the cross-motions of the parties, and the Court, having filed its memorandum opinion and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the motion of the plaintiffs for summary judgment be and it is hereby denied, and the motion of the defendants for summary judgment be and it is hereby sustained. The complaint of the plaintiffs is hereby dismissed.

This is a final and appealable judgment and there is no just cause for delay.

Dated: 5-18-79

(s) Charles M. Allen
Chief Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 75-0387 L(A)

LINNIE LINDSEY, et al. - - - - - *Plaintiffs*

v.

HOUSING AUTHORITY OF LOUISVILLE, et al. - *Defendants*

MEMORANDUM OPINION—Entered May 18, 1979

This is a suit challenging the constitutionality of that portion of KRS 454.030 which allows for service of process by posting in forcible entry and detainer cases. The matter now stands before the Court on cross-motions of the parties for summary judgment.

KRS 454.030 reads as follows:

> "Forcible entry or detainer, how notice served. If the officer directed to serve notice on the defendant in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the defendant's family thereon over sixteen years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court."

It is observed that the statutes first provide for personal service; secondly for substituted service, and thirdly for that is known as "conspicuous service by posting".

In the case of *Weber* v. *Grand Lodge of Kentucky, F. & A.M.*, 169 Fd. 522 (6th Cir. 1909), the court held that the posting statute was constitutional and was reasonable, the court being of the opinion that it was reasonable to presume that a tenant would receive information by a notice posted on the doors of the premises in dispute within the time he was required to appear. See p. 528.

Plaintiffs, who are tenants against whom default judgments were rendered argue that *Weber, supra,* has no more vitality, and that the recent decision of the Supreme Court in *Shaffer* v. *Heitner,* 433 U. S. 186 (1977) indicates that the statute should now be declared unconstitutional.

Defendants rely upon *Velazquez* v. *Thompson,* 451 F. 2d 202 (2nd Cir. 1971) and *Sullivan* v. *Choquette,* 420 F. 2d 674 (1st Cir. 1969). We should also consider the general language contained in *Lindsey* v. *Normet,* 405 U. S. 56 (1972) and *Mullane Special Guardian* v. *Central Hanover Bank & Trust Company, Trustee,* 339 U. S. 306 (1950). In *Lindsey* v. *Normet, supra,* the Supreme Court made the following observations:

> "There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether a tenant pays him rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited

> harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property. Holding over by the tenant beyond the term of his agreement or holding without payment of rent has proved a virulent source of friction and dispute. We think Oregon was well within its constitutional powers in providing for rapid and peaceful settlement of these disputes."

In *Mullane* v. *Central Hanover Trust Company, supra,* the Supreme Court balanced "the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement" even though some or all of the claims of individuals concerned were outside of the State. As the Court said, "(a) construction of the Due Process Clause which said, place impossible or impractical obstacles in the way could not be justified." See 306 U. S. at pp. 313, 314.

Against this interest, the court held that it must balance the individual interests sought to be protected by the Fourteenth Amendment, and that that interest is defined by the holding that " 'The fundamental requisite of due process of law is the opportunity to be heard'." (citing *Grannis* v. *Ordean,* 234 U. S. 385, 394.) See 306 U. S. at p. 314. A more specific statement appears later on p. 314:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer,* 311 U. S. 457; *Grannis* v. *Ordean,* 234 U. S. 385; *Priest* v. *Las Vegas,* 232 U. S. 604; *Roller* v. *Holly,* 176 U. S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean, supra,* and it must afford a reasonable time for those

interested to make their appearance, *Roller* v. *Holly, supra,* and cf. *Goodrich* v. *Ferris,* 214 U. S. 71. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' *American Land Company* v. *Zeiss,* 219 U. S. 47, 67; and see *Blinn* v. *Nelson,* 222 U. S. 1, 7." PP. 314, 315 of 339 U. S.

In *Mullane* v. *Central Hanover Trust Company, supra,* it was held that publication by a newspaper of a proceeding to settle a fiduciary account did not represent due process, and that due process could have been accomplished by giving mailed notice to known beneficiaries. In addition, the court states at page 316:

"Nor is publication here reinforced by steps likely to attract the parties' attention to the proceeding. It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of

> nothing, cf. *Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Savings Bank* v. *California*, 263 U. S. 282, or that he has left some caretaker under a duty to let him know that it is being jeopardized. *Ballard* v. *Hunter*, 204 U. S. 241; *Huling* v. *Kaw Valley R. Co.*, 130 U. S. 559. As phrased long ago by Chief Justice Marshall in *The Mary*, 9 Cranch 126, 144, 'It is the part of common prudence for all those who have any interest in (a thing), to guard that interest by persons who are in a situation to protect it'."

While the language contained in the above quotation indicates that the *Mullane* court would probably have made short shrift of the plaintiff's argument that posting is unconstitutional without giving additional notice by mailing it does not decide the issue. Both the district court and the circuit court held constitutional a New York repossession procedure which provides for the same steps to be taken as are required under the Kentucky statute, except that service of the notice of petition must also be made by a mailing to the tenant within one day after delivery of the petition to the tenant or a person who lives at the tenant's residence or following the affixing of notice. Therefore, *Velazquez* v. *Thompson, supra,* does not decide the issue presented here, since plaintiffs themselves are in agreement that the mailing of notice in addition to the other procedures set out in the statute would be constitutionally adequate.

While this Court is of the opinion that the New York statute is much superior to the Kentucky statute in its requirement of mailing the Court notes also that in *Velazquez* v. *Thompson*, 321 F. Supp. 34 (S.D. N.Y. 1970), at p. 40, the district court pointed out that plaintiffs' alternatives of imposing requirements of due diligence or registered-certified mail were preferable, but could not be mandated by a

federal court, since due process does not require a state to adopt the optimum method of service but only a minimum standard be satisfied.

While this Court realizes that conditions have changed since the decision in *Weber* v. *Grand Lodge of Kentucky, F. & A.M., supra,* and that the regard for law seems to have diminished in that there is undisputed testimony in this case that notices posted on the apartment doors of tenants are often removed by other tenants, the Court still does not believe that a sufficient showing of unreasonableness of opportunity to be heard has been made. In so holding, the Court takes into consideration the fact that posting only comes into play after the officer directed to serve notice cannot find the defendant on the premises or any members of the defendant's family over 16 years of age.

Coupling this understanding with the fact that the Sixth Circuit Court of Appeals has addressed itself to this problem, albeit 70 years ago, and the fact that plaintiffs have not been able to cite any case holding posting as a third method of service in forcible entry and detainer cases unconstitutional, this Court is impelled to hold that the statute is constitutional. District courts are required to follow the decisions of their circuit courts and this is a salutary rule that this Court will follow in every instance. If the appellate court believes that this rule is now unsound, then, of course, it is free to formulate a new decision and hold the statute unconstitutional.

We have this day entered our summary judgment for the defendants.

Dated: 5-18-79

(s) Charles M. Allen
Chief Judge

cc: Counsel of Record

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-3477

LINNIE LINDSEY, BARBARA HODGENS and PAMELA RAY, - - - - *Plaintiffs-Appellants,*

v.

JOSEPH GREENE and UNKNOWN DEPUTY SHERIFFS, - - - - - *Defendants-Appellees.*

On Appeal From the United States District Court for the Western District of Kentucky

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DECISION—Entered and Filed May 18, 1981

Before: KEITH and MERRITT, Circuit Judges; CELEBREZZE, Senior Circuit Judge.

MERRITT, Circuit Judge. This case presents the single issue of the constitutionality of a Kentucky statute that allows constructive service of process by posting in forcible entry and detainer actions. The statute, KY. REV. STAT. §454.030, states:

> If the officer directed to serve notice on the defendant in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the defendant's family thereon over sixteen years of age, and if no such person is found he may serve the notice by posting a copy

> thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court.

Plaintiffs-appellants, tenants in a Louisville housing project, claim that service by posting allows judgment without notice in violation of the Due Process Clause. The District Court granted summary judgment against them. We reverse and, in light of intervening Supreme Court cases changing the law, hereby overrule *Weber* v. *Grand Lodge of Kentucky*, 169 F. 522 (6th Cir.), *cert. denied*, 215 U. S. 606 (1909).

In 1975 the Louisville Housing Authority filed detainer actions against appellants in state court in order to repossess their apartments. Process was served by posting copies of the summonses on the doors of their apartments. They allege that they never saw the summonses and did not learn of them until they were served with writs of possession, executed after default judgments had been entered against them and the time for appeal had expired.

Having no recourse in state court, appellants filed the present action in the United States District Court for the Western District of Kentucky, seeking declaratory and injunctive relief under 42 U.S.C. § 1983 for violation of the right to notice guaranteed by the Due Process Clause. Uncontradicted testimony taken in depositions indicated that some fifty percent of summonses were served via posting and that not infrequently the posted summonses were removed by people other than those served, thus affording tenants no notice of the proceedings against them. The District Court recognized the problem but nonetheless dismissed the complaint, relying on the authority of *Weber*.

In *Weber* the Sixth Circuit rejected a similar constitutional challenge to the predecessor of § 454.030, which was in all relevant respects identical to the rule challenged now.

Plaintiffs in *Weber* served process on out-of-state defendants who had leased realty in Kentucky by posting a copy of the summons on the realty. The Court noted that the constitutionality of such constructive notice was "well settled by repeated decisions of the Supreme Court." 169 F. at 527.

Federal courts have long held that procedural due process requirements come into play when governmental power is used to deprive a person of an interest, derived from the common law, in the peaceful possession and use of real property. Notice of suit and an opportunity to be heard is an essential element of a judicial proceeding, distinguishing it from the exercise of arbitrary power.[1]

Crucial to our Court's decision in *Weber* was the traditional distinction between proceedings *in rem* and proceedings *in personam* observed by the Supreme Court throughout the nineteenth century.[2] Different standards governed

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[1]Questions of notice similar to the one presented here under the Due Process Clause obviously also arise in international law and under the Full Faith and Credit Clause of the Constitution. There is a long line of cases developing notice standards in these areas. For example, in an 1815 case from Massachusetts, Sawyer v. Marine Fire & Marine Ins. Co., 12 Mass. 291, a decree of condemnation of a vessel because of its attempt to run a blockade, rendered by the King of Haiti without any notice or hearing granted to the owners of the vessel, was refused by the Massachusetts court and was held not to be res judicata of the facts it purported to find. *See also* Harris v. Balk, 198 U. S. 215 (1905) (establishing notice rules for recognition of judgments under the Full Faith and Credit Clause); Schibsby v. Westenholtz, 6 Q.B. 155 (1870) (a Queen's Bench case discussing similar standards for recognition of judgments in international law).

[2]A state in general has jurisdiction over property within its borders. A proceeding affecting such property obviously affects an absent owner of the thing dealt with. Justice Holmes discussed the distinction between actions *in rem* and *in personam*

(Footnote continued on next page)

the kind of process appropriate in the two kinds of proceedings. The doctrinal framework for measuring those standards set up by the Court in *Pennoyer* v. *Neff*, 95 U. S. 714 (1877), stood for nearly seventy years. In *Pennoyer*, the Court concluded that *in personam* jurisdiction may not ordinarily be obtained without personal service, but that *in rem* jurisdiction may rest upon the fiction that seizure of property does provide notice to its owner. The Court constitutionalized the principle that the states were powerless to extend their jurisdictional authority in *in personam* proceedings to those beyond their boundaries as it reaffirmed the power of the states to adjudicate all rights to property within their boundaries, regardless of the presence of its owners.

The *Weber* Court concluded that the proceeding before it was "in the nature of a proceeding *in rem*." 169 F. at 527. It recognized that the jurisdictional rule established in *Pennoyer* required it to choose between allowing constructive service by posting or denying the state the power to settle the claims of non-residents to property within the state. *Id.* at 526. It rested its conclusion that service by posting satisfied due process requirements upon four Su-

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(Footnote continued from preceding page)
in the following language: "If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defense, the action is *in personam*, although it may concern the right to or possession of a tangible thing. . . . If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if anyone in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is *in rem*." Tyler v. Judges of Court of Registration, 175 Mass. 71, 76, 55 N. E. 812, 814 (1900).

preme Court cases, all decided in the shadow of *Pennoyer: Huling* v. *Kaw Valley Railroad*, 130 U. S. 559 (1889); *Arndt* v. *Griggs*, 134 U. S. 316 (1890); *Ballard* v. *Hunter*, 204 U. S. 241 (1907); and *Longyear* v. *Toolan*, 209 U. S. 414 (1908). In each case the Court had upheld the constitutionality of statutes that provided for service by posting in *in rem* proceedings. It had held in each case that due process required no effort to give defendants in *in rem* proceedings personal notice.

Subsequent decisions by the Supreme Court have removed the doctrinal framework underlying the Sixth Circuit's decision in *Weber*. With *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950); and *Shaffer* v. *Heitner*, 433 U. S. 186 (1977), the Court effectively erased the former distinction between *in rem* and *in personam* jurisdiction. On the one hand the cases extended state jurisdiction to persons not within the territorial boundaries, so long as sufficient "minimum contacts" existed between the person and the state; on the other they established stricter due process notice requirements, limiting the use of such formerly permissible methods as publication. The Court has recognized that the belief that "an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property" is an outmoded fiction. *Shaffer* v. *Heitner*, 433 U. S. at 212. It accordingly has held that the Fourteenth Amendment right to fair notice "cannot depend on the classification of an action as *in rem* or *in personam*." *Id.* at 206. *Accord, Mullane* v. *Central Hanover Bank & Trust Co., supra.*

The standard now applicable to the present case as well as to traditional *in personam* proceedings is that set out in *Mullane:* the "fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action

and afford them an opportunity to present their objections." 339 U. S. at 314. The Court held in *Mullane* that published notice of judicial settlement constituted insufficient notice to those beneficiaries of a common trust fund who could easily be reached by mail. Notice by publication was inadequate "not because in fact it fails to reach everyone, but because . . . it is not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.* at 319. The Court followed *Mullane* in two later cases arising out of condemnation proceedings, ruling invalid notice by publication in *Walker* v. *City of Hutchinson,* 352 U. S. 112 (1956), and notice by posting near but not on the landowner's property in *Schroeder* v. *City of New York,* 371 U. S. 208 (1962).

The precise issue raised in the present case — whether notice by posting on tenants' apartments meets the constitutional test of adequacy — has never been treated by the Supreme Court, nor by any Court of Appeals. The reasoning of the Supreme Court's decisions seems clearly to demand in the present case, however, that the state at least provide notice by ordinary mail. In *Mullane* the Court concluded that where, as in the present case, addresses are known, "the reasons disappear for resort to means less likely than the mails to apprise" affected parties of pending proceedings. 339 U. S. at 318. There was undoubtedly a time when posting provided a surer means of giving notice than did mailing. That time has passed. The uncontradicted testimony by process servers themselves that posted summonses are not infrequently removed by persons other than those served constitutes effective confirmation of the conclusion that notice by posting "is not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.* at 319. Whatever it may once have been, the mail today is recognized as an efficient and inexpensive means of communication. *Id.*

Requiring Kentucky to provide notice by mail when personal service proves infeasible will not be overly burdensome. The cost will be minimal, and the state's conceded interest in providing a summary procedure for settlement of landlord-tenant disputes will not be seriously circumscribed. The New York counterpart to § 454.030, for example, prescribes that when notice is served by posting, a copy of the petition must be sent by registered or certified mail within a day of the posting. *See Velazquez* v. *Thompson*, 451 F. 2d 202, 205 (2d Cir. 1971).

Accordingly, the judgment below is reversed and the cause remanded for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-3477

LINNIE LINDSEY, BARBARA HODGENS and PAMELA RAY - - - - - - - *Appellees*

v.

JOSEPH GREENE and UNKNOWN DEPUTY SHERIFFS - - - - - - - - *Appellant*

Notice of Appeal to the United States Supreme Court From a Judgment of a Court of Appeals

---

NOTICE OF APPEAL

Appellant, Joseph Green and Unknown Deputy Sheriffs, appeal to the Supreme Court of the United States from the final judgment of this court entered May 18, 1981, reversing a judgment that Ky. Rev. Stat. 454.030 was constitutional.

This appeal is taken pursuant to 28 U.S.C.A. 1254(2). The Court of Appeals ruled that Ky. Rev. Stat. 454.030 was violative of the notice requirement of the Due Process Clause. Appellant has at all times claimed the statute was

not violative of the Due Process Clause. The final judgment from which this appeal is taken is in favor of invalidity of said statute.

June , 1981.

(s) John E. Swain, Jr.
Attorney for Appellant
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(502) 584-8303

(s) William L. Hoge, III
Attorney for Appellant
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CERTIFICATE

I hereby certify that a copy of the foregoing instrument was mailed to Robert E. Smith, Legal Aid Society, 425 W. Muhammad Ali Boulevard, Louisville, Kentucky 40202, Ms. Gail Leeco, Attorney General's Office, Commonwealth of Kentucky New Capitol Annex, Frankfort, Kentucky 40601, and Office of the Clerk, United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio 45202 this 2nd day of July, 1981.

(s) William L. Hoge, III
1112 Kentucky Home Life Bldg.
Louisville, Kentucky 40202
(502) 581-6336

PROOF OF SERVICE

I, William L. Hoge, III, Counsel for the Appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of August, 1981, I served Counsel for the Appellees, Robert E. Smith, Legal Aid Society, 425 W. Muhammad Ali Boulevard, Louisville, Kentucky 40202, and Ms. Gail Leeco, Attorney General's Office, Commonwealth of Kentucky, New Capitol Annex, Frankfort, Kentucky 40601, by placing in the United States Mail, first class postage prepaid, three copies of the foregoing.

WILLIAM L. HOGE, III

Assistant County Attorney

Joint Appendix

Office-Supreme Court, U.S.
FILED
DEC 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-341

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOSEPH GREEN and
UNKNOWN DEPUTY SHERIFFS - - Appellants

versus

LINNIE LINDSEY,
BARBARA HODGENS and
PAMELA RAY - - - - - - Appellees

Appeal from the United States Court of Appeals
for the Sixth Circuit

JOINT APPENDIX

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APPEAL DOCKETED AUGUST 17, 1981
PROBABLE JURISDICTION NOTED OCTOBER 19, 1981

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UNITED STATES COURT OF APPEALS

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SHERIFFS - - - - - - - - *Appellant*

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(s) William L. Hoge, III
1112 Kentucky Home Life Bldg.
Louisville, Kentucky 40202
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DECISION—Entered and Filed May 18, 1981

Before: KEITH and MERRITT, Circuit Judges; CELEBREZZE, Senior Circuit Judge.

MERRITT, Circuit Judge. This case presents the single issue of the constitutionality of a Kentucky statute that allows constructive service of process by posting in forcible entry and detainer actions. The statute, KY. REV. STAT. §454.030, states:

> If the officer directed to serve notice on the defendant in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the defendant's family thereon over sixteen years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court.

Plaintiffs-appellants, tenants in a Louisville housing project, claim that service by posting allows judgment without notice in violation of the Due Process Clause. The District Court granted summary judgment against them. We reverse and, in light of intervening Supreme Court cases changing the law, hereby overrule *Weber* v. *Grand Lodge of Kentucky,* 169 F. 522 (6th Cir.), *cert. denied,* 215 U. S. 606 (1909).

In 1975 the Louisville Housing Authority filed detainer actions against appellants in state court in order to repossess their apartments. Process was served by posting copies of the summonses on the doors of their apartments. They allege that they never saw the summonses and did not learn of them until they were served with writs of posses-

sion, executed after default judgments had been entered against them and the time for appeal had expired.

Having no recourse in state court, appellants filed the present action in the United States District Court for the Western District of Kentucky, seeking declaratory and injunctive relief under 42 U.S.C. § 1983 for violation of the right to notice guaranteed by the Due Process Clause. Uncontradicted testimony taken in depositions indicated that some fifty percent of summonses were served via posting and that not infrequently the posted summonses were removed by people other than those served, thus affording tenants no notice of the proceedings against them. The District Court recognized the problem but nonethless dismissed the complaint, relying on the authority of *Weber*.

In *Weber* the Sixth Circuit rejected a similar constitutional challenge to the predecessor of § 454.030, which was in all relevant respects identical to the rule challenged now. Plaintiffs in *Weber* served process on out-of-state defendants who had leased realty in Kentucky by posting a copy of the summons on the realty. The Court noted that the constitutionality of such constructive notice was "well settled by repeated decisions of the Supreme Court." 169 F. at 527.

Federal courts have long held that procedural due process requirements come into play when governmental power is used to deprive a person of an interest, derived from the common law, in the peaceful possession and use of real property. Notice of suit and an opportunity to be heard is

an essential element of a judicial proceeding, distinguishing it from the exercise of arbitrary power.[1]

Crucial to our Court's decision in Weber was the traditional distinction between proceedings *in rem* and proceedings *in personam* observed by the Supreme Court throughout the nineteenth century.[2] Different standards governed the kind of process appropriate in the two kinds of proceedings. The doctrinal framework for measuring those standards set up by the Court in *Pennoyer* v. *Neff*, 95 U. S. 714 (1877), stood for nearly seventy years. In *Pennoyer*,

---

[1]Questions of notice similar to the one presented here under the Due Process Clause obviously also arise in international law and under the Full Faith and Credit Clause of the Constitution. There is a long line of cases developing notice standards in these areas. For example, in an 1815 case from Massachusetts, Sawyer v. Marine Fire & Marine Ins. Co., 12 Mass. 291, a decree of condemnation of a vessel because of its attempt to run a blockade, rendered by the King of Haiti without any notice or hearing granted to the owners of the vessel, was refused by the Massachusetts court and was held not to be res judicata of the facts it purported to find. *See also* Harris v. Balk, 198 U. S. 215 (1905) (establishing notice rules for recognition of judgments under the Full Faith and Credit Clause); Schibsby v. Westenholtz, 6 Q.B. 155 (1870) (a Queen's Bench case discussing similar standards for recognition of judgments in international law).

[2]A state in general has jurisdiction over property within its borders. A proceeding affecting such property obviously affects an absent owner of the thing dealt with. Justice Holmes discussed the distinction between actions *in rem* and *in personam* in the following language: "If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defense, the action is *in personam*, although it may concern the right to or possession of a

(Footnote continued on next page)

the Court concluded that *in personam* jurisdiction may not ordinarily be obtained without personal service, but that *in rem* jurisdiction may rest upon the fiction that seizure of property does provide notice to its owner. The Court constitutionalized the principle that the states were powerless to extend their jursdictional authority in *in personam* proceedings to those beyond their boundaries as it reaffirmed the power of the states to adjudicate all rights to property within their boundaries, regardless of the presence of its owners.

The *Weber* Court concluded that the proceeding before is was "in the nature of a proceeding *in rem*." 169 F. at 527. It recognized that the jurisdictional rule established in *Pennoyer* required it to choose between allowing constructive service by posting or denying the state the power to settle the claims of non-residents to property within the state. *Id.* at 526. It rested its conclusion that service by posting satisfied due process requirements upon four Supreme Court cases, all decided in the shadow of *Pennoyer*: *Huling* v. *Kaw Valley Railroad*, 130 U. S. 559 (1889); *Arndt* v. *Griggs*, 134 U. S. 316 (1890); *Ballard* v. *Hunter*, 204 U. S. 241 (1907); and *Longyear* v. *Toolan*, 209 U. S. 414 (1908). In each case the Court had upheld the constitutionality of statutes that provided for service by posting in *in rem* proceedings. It had held in each case that due process re-

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The standard now applicable to the present case as well as to traditional *in personam* proceedings is that set out in *Mullane:* the "fundamental requirement of due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U. S. at 314. The Court held in *Mullane* that published notice of judicial settlement constituted insufficient notice to those beneficiaries of a common trust fund who could easily be reached by mail. Notice of publication was inadequate "not because in fact it fails to reach every-

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The precise issue raised in the present case—whether notice by posting on tenants' apartments meets the constitutional test of adequacy—has never been treated by the Supreme Court, nor by any Court of Appeals. The reasoning of the Supreme Court's decisions seems clearly to demand in the present case, however, that the state at least provide notice by ordinary mail. In *Mullane* the Court concluded that where, as in the present case, addresses are known,"the reasons disappear for resort to means less likely than the mails to apprise" affected parties of pending proceedings. 339 U. S. at 318. There was undoubtedly a time when posting provided a surer means of giving notice than did mailing. That time has passed. The uncontradicted testimony by process servers themselves that posted summonses are not infrequently removed by persons other than those served constitutes effective confirmation of the conclusion that notice by posting "is not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.* at 319. Whatever it may once have been, the mail today is recognized as an efficient and inexpensive means of communication. *Id.*

Requiring Kentucky to provide notice by mail when personal service proves infeasible will not be overly burdensome. The cost will be minimal, and the state's conceded interest in providing a summary procedure for settlement of landlord-tenant disputes will not be seriously circum-

scribed. The New York counterpart to § 454.030, for example, prescribes that when notice is served by posting, a copy of the petition must be sent by registered or certified mail within a day of the posting. *See Velazquez* v. *Thompson,* 451 F. 2d 202, 205 (2d Cir. 1971).

Accordingly, the judgment below is reversed and the cause remanded for proceedings consistent with this opinion.

BRIEF FOR APPELLEES

ISSUE PRESENTED

Whether Kentucky Revised Statute §454.030 which allows for constructive service by posting in forcible entry and detainer actions is constitutional and reasonably calculated to give defendants in such actions notice of the pendency of claims against them?

STATEMENT OF THE CASE

Appellants challenge the constitutionality of Kentucky Revised Statute (hereinafter KRS) §454.030, which provides for constructive service of process in forcible entry and detainer actions by posting summonses on the doors of property at issue. They commenced this action in the United States District Court for the Western District of Kentucky at Louisville pursuant to the Civil Rights Act, 42 U.S.C. §1983, seeking declaratory and injunctive relief pursuant to 28 U.S.C. §§2201 and 2202 for themselves and a class composed of Defendants in forcible entry and detainer actions filed in Jefferson County, Kentucky. On cross motions for summary judgment, Judge Charles M. Allen denied Appellants' Motion and entered judgment for

Appellees. Appellants appeal therefrom as a matter of right pursuant to 28 U.S.C. §1291.

Appellees take exception to the fact that the Appellants have alleged that they never received *actual notice* of the forcible entry and detainer actions (hereinafter FED actions) pending against them. Whether or not they received actual notice cannot now be determined, but one might reasonably expect that if a person were challenging a statute such as in the instant case, they would not admit that they actually received notice. Be that as it may, the fact of actual notice is irrelevant to the question before the Court because the test under the due process clause as to the validity of notice is not whether the defendant actually receives notice, but rather whether the method used is one reasonably calculated to give actual notice. *United States* v. *Smith,* 398 F. 2d 173, 177 (3rd Cir. 1968).

ARGUMENT

The District Court Did Not Err in Upholding the Constitutionalty of KRS 454.030 Which Allows for Constructive Service by Posting Because It Is Reasonably Calculated to Give Defendants in Forcible Entry and Detainer Actions Notice of Actions Against Them.

The concept of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" was espoused in *Mullane* v. *Central Hanover National Bank,* 339 U. S. 306 (1950), and defendants submit that in FED actions the circumstances warrant the kind of service contemplated by KRS 454.030.

KRS 454.030 reads as follows:

> Forcible entry or detainer, how noticed served. — If the officer directed to serve notice on the defendant in

> forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the defendant's family thereon over sixteen (16) years of age, *and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises.* The notice shall state the time and place of meeting the court. (Emphasis added)

The circumstances and characteristics surroundng the landlord-tenant relationship and the need for FED actions was expressed in *Lindsey* v. *Normet*, 405 U. S. 36, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972) as follows:

> There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property. Holding over by the tenant beyond the term of his agreement or holding without payment of rent has proved a virulent

> source of friction and dispute. We think Oregon was well within its constitutional powers in providing for rapid and peaceful settlement of these disputes. (31 L. Ed. 2d at P. 50).

Although the *Lindsey* case, *supra,* did not deal with the issue of whether "posting" is sufficient notice, the Appellees' position is that the arguments put forth in favor of having landlord-tenant disputes settled rapidly and peacefully are applicable to having the defendants served rapidly.

One point that Appellees wish to emphasize is that "posting" as a method of service is used only as a last resort. The officer of the court who serve summons in FED actions first attempt to serve the defendant personally, and second, they attempt service by leaving the summons with a member of defendant's family over sixteen (16) years of age. If a landlord has to wait until a defendent is personally served with a copy of the summons and complaint, a tenant could post-pone having to appear in court and vacate the leased premises for as long as he could dodge the process server. On the other hand, by posting a copy of summons in a conspicuous place on the premises, the tenant is served as soon as he returns home with little or no chance to evade the service of process.

In the case of *Weber* v. *Grand Lodge of Kentucky, F.&A.M.,* 169 Fed. 522 (6th Cir. 1909), certiorari denied 30 S. Ct. 406, 215 U. S. 606, 54 L. Ed. 346, the United States Court of Appeals for the Sixth Circuit decided the very same issue which is before this Court and upheld the constitutionality of service by posting. At P. 528 the court stated:

The purpose of notice is to give the defendant an opportunity to appear and be heard with respect to his property. The manner in which it is to be given and the time within which he may appear are subject to the discretion of the Legislature, provided always that it be of such character as to raise a reasonable presumption that the defendant, if he exercises that degree of care about his property which ordinary men do exercise, will learn of the proceeding and as to where and when he may defend. If the legislature provision have reasonable regard to the character of the proceeding and the probabilities that the owner of the property will be advised, it is due process . . . *The particular case we have before us, that of a tenant holding over after expiration of his term, seems to present no serious question as to the reasonableness of the manner of giving notice or the time for an appearance. There is nothing unreasonable in presuming that such a tenant would receive information by a notice posted on the doors of the premises in dispute within the time he was required to appear.* That they did so in ample time is a fact which, if of no other significance, is indicative of the reasonable character of the notice. Men, whether residents or nonresidents, are presumed to make contracts with reference to the laws of the state in which the subject-matter of the contract, if real estate, is situated. (Emphasis added) (169 Fed. at page 528)

In the Brief for Appellant they suggest that the case of *Shaffer* v. *Heitner*, 43 U. S. 186 (1977) impliedly overrules the *Weber* case, *supra*. The defendants submit that *Shaffer*, *supra*, does no such thing and that *Weber*, *supra*,

is still the law in Kentucky until it is expressly overruled by this or some other Court.

In fact, whereas the *Weber* case, *supra,* dealt with the constitutionality of the constructive notice provision of the statute in FED actions, the *Shaffer* case, *supra,* concerned "minimum contacts" over the defendant sufficient to justify the exercise of quasi-in rem jurisdiction. In the case at bar there is no question of "minimum contacts". The defendants and the property are located in this state. In *Shaffer, supra,* neither the defendants or the property were actually in the state.

In the instant case, the only question is whether the method of notice is reasonably calculated, under the circumstances, to apprise the defendants of the pendency of the actions against them. In *Weber, supra,* the Court addressed the reasonableness of the method of notice and stated:

> The particular case we have before us, that of a tenant holding over after expiration of his term, seems to present no serious question as to the reasonableness of the manner of giving notice or the time for an appearance. There is nothing unreasonable in presuming that such a tenant would receive information by notice posted on the doors of the premises in dispute within the time he was required to appear. (169 Fed. at page 528).

In *Sullivan* v. *Choquette,* 420 F. 2d 674 (1st Cir., 1969); certiorari denied 90 S. Ct. 1691, 398 U. S. 904, 26 L. Ed. 2d 62; rehearing denied, 90 S. Ct. 2237, 399 U. S. 938, 26 L. Ed. 2d 809, the Court stated:

> In actions concerning rights in property within the state, due process requires only that reasonable no-

tice and an opportunity to be heard be afforded. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); F. James, Civil Procedure §§ 12.1, 12.7 12.11 (1965) Restatement of Judgments § 32, comments a, f, and g (1942); see *Wagner* v. *Wagner*, 110 U. S. App. D.C. 345, 293 F. 2d 533 (1961); *Schulte* v. *Walker*, 130 F. 2d 907 (7th Cir. 1942), (420 F. 2d at Page 676).

In *Velazquez* v. *Thompson*, 451 F. 2d 202 (2nd Cir. 1971), the plaintiffs, who were all New York City apartment dwellers who were evicted from their apartments because of non-payment of rent, challenged the statutory scheme for summary eviction. The New York statute goes further than KRS 454.030 in that it requires that the complaint and summons be sent by registered mail in cases where it has been previously posted. The court found that the statute "clearly complies with due process requirements." (491 F. 2d at Page 201).

In Judge Charles M. Allen's district court opinion in the instant case he stated:

> While this court is of the opinion that the New York statute is much superior to the Kentucky statute in its requirements of mailing, the court also notes that in *Velazquez* v. *Thompson*, 321 F. Supp. 34 (S.D. N.Y. 1970), at P. 40, the district court pointed out that plaintiffs' alternatives of imposing requirements of due diligence or registered-certified mail were preferable, *but could not be mandated by a federal court, since due process does not require a state to adopt the opinion method of service but only a minimum standard be satisfied.*" (Page 4 of Judge Allen's opinion) (Emphasis added).

The *Velazquez* case, *supra,* was cited with approval by the District Columbia Court of Appeals in *Westmoreland* v. *Weaver Brothers, Inc.,* 293 A. 2d 506 (1972), where as the Court stated:

> *We also disagree with appellants contention that service by posting violated constitutional due process requirements.* The adequacy of notice for due process purposes depends on whether it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank and Trust Company,* 339 U. S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). In a landlord-tenant action for possession of premises '[i]t is to be noted initially that since this is an action to recover the possession of premises occupied by a person who is resisting removal, his whereabouts are obviously fixed and easily determinable. Thus the usual problem of serving a person whose present residence is unknown, which gives rise to much of the constitutional litigation . . . is absent.' *Velazquez* v. *Thompson,* 451 F. 2d 202, 205 (2d Cir. 1971). *In such a suit, we cannot say that service by posting is not reasonably calculated to give the tenant notice of the pending action and therefore there is not constitutional infirmity.* (295 A. 2d at pages 509-510) (Emphasis added).

The Appellees submit that KRS 454.030 satisfies the minimum standards of due process and that it is not necessary for the Kentucky statute to require an "optimum" method of service as with the New York statute. Notice, reasonably calculated to apprise the defendants of actions against them is the touchstone of due process.

CONCLUSION

For the above stated reasons, Appellees request that this Court affirm the Judgment of the District Court and enter Judgment for the Appellees.

Respectfully submitted,

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BRIEF FOR APPELLANTS

ISSUE PRESENTED

Did the District Court err in holding that Kentucky Revised Statute §454.030, which allows for constructive service of process by posting in forcible entry and detainer actions, did not violate the due process rights of resident Defendants who never received actual notice of eviction actions pending against them?

STATEMENT OF CASE

Appellants challenge the constitutionality of Kentucky Revised Statute (hereafter Ky. Rev. Stat.) §454.030, which provides for constructive service of process in forcible entry and detainer actions by posting summonses on the doors of property at issue. They commenced this action in the United States District Court for the Western District of Kentucky at Louisville pursuant to the Civil Rights Act, 42 U.S.C. §1983, seeking declaratory and injunctive relief pursuant to 28 U.S.C. §§2201 and 2202 for themselves and a class composed of Defendants in forcible entry and detainer actions filed in Jefferson County, Kentucky. On cross motions for summary judgment, Judge Charles M. Allen denied Appellants' Motion and entered judgment for Appellees. Appellants appeal therefrom as a matter of right pursuant to 28 U.S.C. §1291.

The facts relevant to this appeal are as follows: In 1975 the Housing Authority of Louisville filed forcible entry and detainer actions (hereafter f.e.d. actions) against Appellants in the Magisterial District Courts of Jefferson County, Kentucky. Appendix pp. 12, 13, 24. Process was served by posting copies of the summonses on the affected premises. Appendix pp. 12, 14, 15, 24. Appellants never received copies of the posted summonses. Appendix pp. 12, 14, 24. Although the reasons for this are unknown to them, the Court below found, on the basis of uncontroverted evidence, that posted summonses are often removed by persons other than parties to the litigation. Appendix p. 144. Appellants became aware of the pending actions when served with Writs of Possession, executed after default judgments, awarding possession to the Housing Authority of Louisville, had been entered against them and after the

time in which to appeal these judgment had expired. Appendix 12-15, 24.[1] Because they had no recourse in state court, Appellants filed the present action.[2] They submit that, when process is served by posting, additional notice by first class mail is necessary to inform them of actions pending against them.

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[1]See Acts 1952, Ch. 84, §1 (formerly Ky. Rev. Stat. §383.245, which states:

> If the party against whom the inquisition is found fail to file a traverse of the inquisition with the judge or justice who presided, on or before the third day after the finding of the inquest, the judge, or justice shall, on request, issue his execution for the costs; and, if the inquisition be in favor of the plaintiff, he shall also issue his warrant of restitution in substance as follows: ".....County. To the Sheriff [or any constable] of ..... County, Whereas, C D and E F have, by an inquisition taken before me, J. P. a justice of the peace for said county, been found guilty of a forcible entry in [or detainer of] one house and field, lying on the waters of ....., in the county aforesaid [or other general description of the possessions], to the injury of A B; You are therefore, in the name of the commonwealth of Kentucky, commanded that, with the power of the county if necessary, you put the said A B in the possession of said premises; and make return within ..... days to me, how you have executed this warrant. Given under my hand this ..... day of ....., J.P."

[2]As stated in Acts 1952, ch. 84 §1, Writs of Possession cannot issue until the time in which to appeal has expired.

ARGUMENT

1. THE DISTRICT COURT ERRED IN UPHOLDING THE CONSTITUTIONALITY OF SERVICE BY POSTING BASED ON THIS COURT'S DECISION IN *WEBER* v. *GRAND LODGE OF KY., F. & A.M.*, 169 FED. 522 (6th CIR. 1909) BECAUSE INTERVENING SUPREME COURT DECISIONS HAVE OVERRULED *WEBER SUB SILENTO.*

The Due Process Clause of the Fourteenth Amendment requires Defendants be given opportunity to be heard. *Grannis* v. *Ordean*, 234 U. S. 385 (1914); *Mullane* v. *Central Hanover Bank and Trust*, 339 U. S. 306 (1950). This right is meaningless unless one "is informed that the matter is pending and can choose for himself whether to appear or default acquiesce or contest." *Id.* at 314. Due Process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer*, 311 U. S. 457; *Grannis* v. *Ordean*, 234 U. S. 385; *Priest* v. *Las Vegas*, 232 U. S. 604; *Roller* v. *Holly*, 176 U. S. 398." *Id.* at 314.

Kentucky Revised Statute §454.030 provides for notice by posting in f.e.d. action.[3] In 1909, this Court, applying

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[3]Ky. Rev. Stat. §454.030 states:

> If the officer directed to serve notice on the Defendant in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the defendant's family thereon over sixteen years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court.

a standard of review different from that articulated in *Mullane,* held that Ky. Stat. §2294 (1903),[4] the predecessor of Ky. Rev. Stat. § 454.030, did not deprive Defendants of due process rights. *Weber* v. *Grand Lodge of Ky., F. & A.M.,* 169 Fed. 522 (6th Cir. 1909), cert. denied 215 U. S. 606 (1909). Appellants submit that recent cases, in which the Supreme Court has more fully articulated the parameters of the Due Process Clause, compel a reversal of *Weber.* Alternatively, the facts in the case at bar are sufficiently different from the facts of *Weber* to mandate its distinction.

A. The *Weber* Court Was Bound by *Arndt* v. *Griggs,* 134 U. S. 316 (1890); *Ballard* v. *Hunter,* 204 U. S. 241 (1907), *Huling* v. *Kaw Valley Railway Co.,* 130 U. S. 559 (1889) and *Penoyer* v. *Neff,* 95 U. S. 714 (1877), Which Held That Both Necessity and Sufficiency of Notice Were Determined by the State Court's Jurisdictional Power.

Plaintiffs in *Weber* initiated an eviction action against out of state Defendants, who had leased realty in Kentucky, by posting a copy of the summons on the realty. *Weber,*

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[4]Ky. Stat. §2294 states:

> If the officer cannot find the defendant, in a writ of forcible entry or detainer, on the premises mentioned in the same, and there shall be no member of the defendant's family thereon over sixteen years of age with whom notice can be left, posting a copy of the notice of the time and place of the meeting of the court in a conspicuous place on the premises shall be deemed an execution of the notice; explaining and leaving a copy of it with a member of the defendant's family over sixteen years of age, if on the premises, shall also be a good service of the notice.

supra at 527. Defendants received actual notice of the pending action and appeared specially to contest the Court's jurisdiction on the grounds that notice by posting was insufficient to meet due process requirements. *Id.* at 524, 528. The Court balanced the state's interest in adjudicating rights to property within its boundaries against the right of a party to notice. *Id.* at 527-528. The State's interest prevailed, for, according to then prevailing jurisdictional theory, the state would have been powerless to adjudicate rights of out of state Defendants to property within its boundaries had constructive service been found unconstitutional. *Id.* at 526, 527.

The continued validity of *Weber* cannot be assessed without examination of the precedent by which the Court was bound. See Hazard, A General Theory of State Court Jurisdiction, 1965 Sup. Ct. Rev. 241, 258-262, as cited in *Shaffer* v. *Heitner*, 433 U. S. 186, 199 (1977). In the early nineteenth century, the Supreme Court articulated two standards for measuring constitutional sufficiency of notice; one for proceedings *in personam* and another for proceedings *in rem:*

> [N]otice of the controvery is necessary in order to become a party, and it is a principle of natural justice . . . that before the rights of an individual be bound by a judicial sentence, he shall have notice, *either actual or implied,* of the proceeding against him. *Where these proceedings are against the person, notice is served personally, or by publication; where they are in rem, notice is served upon the thing itself.* (Emphasis added.) *The Mary,* 9 Cranch 126, 144 (1815).

By the late nineteenth century the Court held that a state court's power to notify Defendants of actions against

them was co-extensive with its power to entertain those actions. *Penoyer* v. *Neff*, 95 U. S. 714 (1877). Neff instituted an action against Penoyer for recovery of land, located in Oregon. Penoyer denied Neff's title and right to possession and set up his own right to the title by virtue of a Sheriff's sale to enforce an Oregon judgment, in which Neff was the unsuccessful Defendant. Prior to initiation of Neff's action, Mitchell had instituted an action in the state of Oregon against Neff, an out of state resident, for unpaid attorney's fees. The Oregon notice statute provided for personal service if the Defendant was a non-resident and the action concerned real property within the State. Service was by publication with a copy of the summons sent to Neff at his place of residence. Mitchell obtained a default judgment and executed it by Sheriff's sale of Neff's property, which was purchased by Penoyer. In granting relief to Neff, the Supreme Court held the first judgment void because the Oregon Court had no power to exercise personal jurisdiction over non-residents. Therefore, jurisdiction over Neff never attached. Likewise the Oregon Court never obtained jurisdiction over Neff's property because jurisdiction over property attached only through sequestration of that property prior to judgment.

The theory of state court territorial jurisdiction first propounded by Story in his 1834 treatise, *Commentaries on the Conflict of Laws*, formed the core of Field's analysis in *Penoyer:*

> [E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil *status* and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with

> which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat. Int. Law, pt. 2, c. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusions of power from all others. And so it is laid down by jurists, as an elementary principle that the laws of one State have no operation outside of its territory except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nulity, and incapable of binding such persons or property in any other tribunals. Story, Confl. Laws, sect. 539. *Id.* at 722-723.

Because persons were only "within" a state's territory if they were physically present, service of the summons, official notice of an action, became the measure of physical presence for purposes of obtaining personal jurisdiction. Where Defendants were outside a Court's territorial reach, the court was powerless to send notice of actions pending against them. Notice which a court was impowered to give was both equal to and limited by the Courts' adjudicatory power.

Even though states could not extend judicial presence beyond their boundaries, they retained power to adjudicate rights in and to all property within their boundaries, regardless of the owner's domicile. Their ability to notify out of state owners of those proceedings was, by implication, limited by their territorial reach. The *Penoyer* Court, in reconciling the state's need to retain jurisdiction and Defendant's need for notice, adopted the fiction that seizure of property is sufficient to notify out of state owners of actions against their property:

> The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. *Id.* at 727.

When combined with the fact that process could not run into another state, this doctrine prohibited the state from providing more siutable notice than that arising from seizure of property.

In a series of cases decided subsequent to *Penoyer*, the Supreme Court more clearly articulated the limit on a state courts' power to send notice outside its territory. See,

e.g., *Arndt* v. *Griggs*, 134 U. S. 316 (1870); *Ballard* v. *Hunter*, 204 U. S. 241 (1907); *Huling* v. *Kaw Valley Railway Co.*, 130 U. S. 559 (1889). In *Arndt*, the Court upheld an Iowa statute which allowed for notice by publication to nonresidents in quiet title actions. In *Ballard*, the Court upheld an Arkansas statute which provided for notice by publication to nonresidents of actions to enforce payment of levee taxes. In *Huling*, the Court upheld a Kansas statute which provided for notice by publication to nonresidents of eminent domain proceedings.

In each of the foregoing, the Court balanced the state's interest in final resolution of property disputes against the individual's interest in being heard. *Arndt, supra* at 320-323. *Ballard, supra* at 254; *Huling, supra* at 563-564. If service by publication were invalid, limitations on the state court's territorial reach would preclude it from adjudicating rights of non-residents to property within its territory. *Arndt, supra* at 320-323; *Ballard, supra* at 254, 262; *Huling, supra* at 563-564. The balance, of necessity, always favored the state, as justified by the fiction that seizure of property was sufficient to give the owner notice of the legal proceedings. *Arndt, supra* at 320-321; *Ballard, supra* at 254, 262; *Huling, supra* at 564.

In upholding service by posting, the *Weber* court relied on *Arndt, Ballard, Huling,* and *Connor* v. *Tennessee Central Railway Co.*, 109 Fed. 931 (6th Cir. 1901). The major premise underlying the *Weber* decision was that, if nonresident Defendants in forcible entry and detainer actions could not be served by posting, they could not be evicted from land within the state. *Weber, supra* at 527-528. As in *Penoyer*, the Court's alternative was to hold notice insufficient and thereby leave the state powerless to evict non-resident tenants who failed to make themselves available for personal service within the State.

B. Service by Posting Is No Longer Reasonable in Light of *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306 (1950) and *Shaffer* v. *Heitner,* 443 U. S. 186 (1977), Which Overruled *Penoyer* and Its Progeny Insofar as They Limited the Notice a Court Was Empowered to Give and Held a Person Had Automatic Notice of All Proceedings Affecting His Property.

The legacy of *Penoyer* and its progeny to the *Weber* Court was twofold. A court had no power over people outside its boundaries and thus could not notify out of state Defendants by mail. In order to retain jurisdiction of such actions the court presumed that persons had notice of all actions affecting property within the state by virtue of their property interest within the State.

In *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945) the Supreme Court abandoned this legacy. The Court, while upholding the power of a state to exercise jurisdiction over a non-resident corporation on the basis of its minimum contacts within the state, overturned judgment for inadequate service. The state's constructive service statute, which provided for service on out of state corporations by mailing service to the Secretary of State, was held fatally defective because the Secretary of State had no duty to notify the Defendant corporation of the pending action. Thus freed from the myths that a court was powerless to give notice which extended beyond its boundaries, the Supreme Court could realistically appraise the adequacy of notice.

In *Mullane* v. *Central Hanover Bank and Trust,* the Court held unconstitutional that portion of the New York Banking Law which allowed for notice by publication to

out of state beneficiaries in proceedings to settle common trusts. The Court balanced the state's interest in adjudicating rights in trusts against the beneficiaries' right to notice of such proceedings. *Id.* at 313-314. While the state interest in closing trusts was clearly sufficient to support jurisdiction over all claimants to the trust, rightful assumption of jurisdiction did not imply adequate notice. *Id.* at 313-314. Notice by publication was sufficient for beneficiaries whose names and addresses were unknown; but, where names and addresses were known, the reasons for using means of notification less reliable than mail disappeared. *Id.* at 318.

Similarly, the Supreme Court has repeatedly held notice by publication insufficient to appraise instate Defendants of actions pending against them. See e.g. *City of New York* v. *New York, New Haven and Hartford Railroad Co.*, 344 U. S. 293 (1953); *Schroeder* v. *City of New York*, 371 U. S. 208 (1962); *Walker* v. *City of Hutchinson*, 352 U. S. 112 (1956).

For purposes of measuring constitutional sufficiency of notice, it matters not whether the proceeding is *in personam* or *in rem*. *Mullane, supra* at 312-313. "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification." *Shaffer* v. *Heitner, supra* at 212.

The foregoing cases redefined the role of the states in a federal system by discarding the myth that their power terminated at their boundaries. Freed of this fiction the Court could discard its corollary that persons, as a matter of law, have notice of all litigation affecting their property. Although the balancing test employed today is essentially the same as that used by the *Weber* Court, it necessarily follows that the state's expanded power to give notice by

mail requires this Court to assign different rights to the respective interests of the state and the litigant.

Reasonableness of notice is determined by balancing the state's interest in final adjudication of rights to property within its jurisdiction against the individual's interest in notice of the proceedings. *Mullane, supra* at 313-314. Notice which would defeat the state's interest in a final adjudication is not justified. *Id.* at 313-314. When personal service is not possible, the minimally acceptable alternative is that which is most likely to reach the Defendant. *McDonald* v. *Mabee,* 243 U. S. 90, 92 (1917). "Where the names and . . . addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." (Citations omitted.) *Schroeder, supra* at 213. Thus, seizure of property is no longer sufficient to inform persons of actions pending against them. No proceeding will lie against a person readily locatable unless that person is notified at a minimum by first class mail. See: *City of New York, N. Y., N. H. & H. Railway Co., supra; Mullane, supra; Schroeder, supra; Walker, supra.*

Application of the foregoing balancing test to the case at bar discloses no reason why notice by first class mail should not be required. The additional requirement of mailing a summons to the Defendant would not place an undue fiscal or administrative burden on the government. The cost would be that of a first class stamp. The administrative burden would be no more than the time required to address an envelope to Defendant.

The present adequacy of notice by posting must be evaluated in light of the realities of contemporary society rather than by standards which existed at the turn of the century when *Weber* was decided. The United States Supreme Court has long recognized the need to account for

changing societal norms in its application of constitutional guarantees to different factual situations:

> [W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.
>
> *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387 (1926).

The bucholoic rural life confronting the *Weber* court has fallen to the complexity and congestion of present urban environments. While service by posting was reasonably calculated to reach Defendants at the turn of the century, the same is not true today.

Service by posting creates a substantial risk that the Defendant will not receive notice of the action against him. Posting cannot guarantee against the possibility that the summons will be blown away, ripped down by small children or otherwise taken from the attention of the tenant who is being threatened with imminent eviction. Appendix pp. 48, 102-103, 112-113, 130-131, 134. Moreover, it cannot guarantee against the possibility of posting at the wrong address or of a posting at the right address, but on the wrong apartment door. Appendix pp. 70-74. In *Walker* v. *City of Hutchinson*, the Supreme Court took judicial notice of the fact that service by publication rarely informed a landowner of proceedings against his property. *Walker, supra*, at 116. The Sixth Circuit in *Weber* analogized service by posting to service by publication. *Weber, supra* at 527. Similarly, this court is free to take judicial notice of the hazards endemic in service by posting.

Plaintiffs submit that, when service is by posting, a copy of the summons must be mailed to Defendant's last known address before service conforms to the mandates of due process. This additional procedural safeguard would overcome the shortcomings of notice by posting. Notice would be deposited in the tenant's mailbox and, thus, would not be subject to the vagaries of weather or neighborhood children. Furthermore, the possibility of posting on the wrong door would be alleviated with additional service by mail.

The above recommendation finds support in *Palmer* v. *Columbia Gas of Ohio, Inc.*, 479 F. 2d 153 (6th Cir. 1973). Plaintiffs challenged the Columbia Gas Company's utility termination procedures as violative of due process because Plaintiffs received no notice of the actual termination. The Sixth Circuit held that due process required personal notice, by phone, of the termination. Absent phone contact, notification by certified mail, return receipt requested was required. In *Palmer*, Plaintiffs stood to have their utilities terminated. In the case at bar Plaintiffs stand to be evicted from their homes. Justice requires that the notice used in f.e.d. proceedings be as likely to inform Plaintiffs of those proceedings as the notice ordered by the court in utility terminations.

II. THE DISTRICT COURT ERRED IN UPHOLDING THE CONSTITUTIONALITY OF SERVICE BY POSTING BASED ON THIS COURT'S DECISION IN *WEBER* v. *GRAND LODGE OF KY.* BECAUSE THE FACTS IN THE CASE AT BAR DISTINGUISH IT FROM *WEBER.*

A. The Case at Bar Is Distinguishable from *Weber* Because Defendants in *Weber* Received Actual Notice of F.E.D. Proceedings, While Appellants Herein Received No Notice of F.E.D. Actions Pending Against Them.

When posted notice is not seen by Defendants, it does "not constitute the personal notice that the rule enunciated in the *Mullane* case requires." *Schroeder, supra,* at 213. The *Weber* Defendants received notice of the proceedings against them. Appellants, through no fault of their own, received no notice of f.e.d. actions against them until after judgments in those actions had become final. Appendix pp. 12-15, 24. Thus, they were deprived of the most basic due process right, the right to be heard.

B. The Case at Bar is Distinguishable from *Weber* Because *Weber* Involved Out of State Defendants, While Appellants are Kentucky Residents.

Defendants who reside within the forum state must be given personal notice of actions pending against them if reasonably possible. *Walker* v. *City of Hutchinson, supra* at 116. In *Walker* the court held a Kansas condemnation statute, which provided for notice by publication, unconstitutional as applied to Defendants who resided within the state and whose name and addresses were readily ascertainable. The Court distinguished *Huling,* relied upon by

the Court in *Weber*, on the grounds that it applied to out of state Defendants. *Walker, supra* at 116. To the extent that *Mullane* did not overrule the decisions upon which *Weber* is based, the factor of Appellants' in state residence is sufficient to distinguish this case from *Weber*.

C. This Case is Distinguishable from *Weber* Because the Uniform Residential Landlord Tenant Act, Kentucky Revised Statute 383.505 *et seq.*, Adopted by Kentucky Subsequent to *Weber*, has Expanded the Scope of F.E.D. Actions to *In Personam* Proceedings.

The case at bar is distinguishable from *Weber* because the Uniform Residential Landlord Tenant Act, Kentucky Revised Statute 383.505 *et seq.* (1974), (here after U.R.L.T.A.) has expanded the scope of f.e.d. actions to *In Personam* proceedings.

The *Weber* court upheld service by posting in f.e.d. actions because such actions were of limited scope, with the right to possession of property being the sole issue for litigation:

> The remedy of forcible detainer is a special, speedy, and almost summary one. *Donelan* v. *Draddy*, 107 Ky. 339, 343, 53 S. W. 1038. It is, in its widest sense, a statute of peace, and is intended to prevent resort to force. The defense is not guilty. The only judgment is restitution. No title or right is in issue. The single question is whether or not the defendant forcibly detains the premises from the Plaintiff. *Weber, supra* at 526-527.

U.R.L.T.A. modified the forcible entry and detainer action so that the Plaintiff could join a claim for rent with

the action for possession. Kentucky Revised Statute §383.685.[5] It further modified the f.e.d. action by allowing Defendants to interpose warranty of habitability defenses and to counterclaim for damages caused by the violations of U.R.L.T.A. Kentucky Revised Statute §383.575;[6] Kentucky Revised Statute §338.645.[7] Thus, the action now empowers the court to award monetary damages against Plaintiff and Defendant. While Plaintiffs do not suggest

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[5]Ky. Rev. Stat. §383.685 states:

If the rental agreement is terminated, the landlord may have a claim for possession and for rent and a separate claim for actual damages for breach of the rental agreement and reasonable attorney's fees as provided in KRS 383.660(3).

[6]Ky. Rev. Stat. §383.575 states:

A rental agreement, assignment, conveyance, trust deed or security instrument may not permit the receipt of rent free of the obligation to comply with KRS 383.595(1).

[7]Ky. Rev. Stat. §383.645 states:

(1) In an action for possession based upon nonpayment of the rent or in an action for rent when the tenant is in possession, the tenant may counterclaim for any amount he may recover under the rental agreement of KRS 383.565. In that event the court from time to time may order the tenant to pay into court all or part of the rent accrued and thereafter accruing, and shall determine the amount due to each party. The party to whom a net amount is owed shall be paid first from the money paid into court, and the balance by the other party. If no rent remains due after application of this section, judgment shall be entered for the tenant in the action for possession. If the defense or counterclaim by the tenant is without merit and is not raised in good faith, the landlord may recover reasonable attorney's fees.

(2) In an action for rent when the tenant is not in possession, he may counterclaim as provided in subsection (1) but is not required to pay any rent into court.

that personal service is constitutionally mandated in all f.e.d. actions, they do suggest that, when posting is employed, additional service by first class mail is required. This requirement minimizes the dangers inherent in posting, without creating an additional financial or administrative burden for the government. As such it is the minimum necessary to comply with the Due Process Clause of the United States Constitution.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed and remanded with directions to enter Summary Judgment for Appellants.

Respectfully submitted,

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IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 75-0387 L(A)

LINNIE LINDSEY, et al. - - - - - *Plaintiffs*

v.

HOUSING AUTHORITY OF LOUISVILLE, et al. - *Defendants*

SUMMARY JUDGMENT—Entered May 18, 1979

This action, having come on for decision upon the cross-motions of the parties, and the Court, having filed its memorandum opinion and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the motion of the plaintiffs for summary judgment be and it is hereby denied, and the motion of the defendants for summary judgment be and it is hereby sustained. The complaint of the plaintiffs is hereby dismissed.

This is a final and appealable judgment and there is no just cause for delay.

Dated: 5-18-79

(s) Charles M. Allen
Chief Judge

cc: Counsel of Record

MEMORANDUM OPINION—Entered May 18, 1979

This is a suit challenging the constitutionality of that portion of KRS 454.030 which allows for service of process by posting in forcible entry and detainer cases. The matter now stands before the Court on cross-motions of the parties for summary judgment.

KRS 454.030 reads as follows:

> "Forcible entry or detainer, how notice served. If the officer directed to serve notice on the defendant in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the defendant's family thereon over sixteen years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court."

It is observed that the statutes first provide for personal service; secondly for substituted service, and thirdly for what is known as "conspicuous service by posting".

In the case of *Weber* v. *Grand Lodge of Kentucky, F. & A.M.*, 169 Fd. 522 (6th Cir. 1909), the court held that the posting statute was constitutional and was reasonable, the court being of the opinion that it was reasonable to presume that a tenant would receive information by a notice posted on the doors of the premises in dispute within the time he was required to appear. See p. 528.

Plaintiffs, who are tenants against whom default judgments were rendered argue that *Weber, supra,* has no more vitality, and that the recent decision of the Supreme Court in *Shaffer* v. *Heitner,* 433 U. S. 186 (1977) indicates that the statute should now be declared unconstitutional.

Defendants rely upon *Velazquez* v. *Thompson*, 451 F. 2d 202 (2nd Cir. 1971) and *Sullivan* v. *Choquette*, 420 F. 2d 674 (1st Cir. 1969). We should also consider the general language contained in *Lindsey* v. *Normet*, 405 U. S. 56 (1972) and *Mullane Special Guardian* v. *Central Hanover Bank & Trust Company, Trustee*, 339 U. S. 306 (1950). In *Lindsey* v. *Normet, supra*, the Supreme Court made the following observations:

> "There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether a tenant pays him rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property. Holding over by the tenant beyond the term of his agreement or holding without payment of rent has proved a virulent source of friction and dispute. We think Oregon was well within its constitutional powers in providing for rapid and peaceful settlement of these disputes."

In *Mullane* v. *Central Hanover Trust Company, supra*, the Supreme Court balanced "the vital interest of the State in

bringing any issues as to its fiduciaries to a final settlement" even though some or all of the claims of individuals concerned were outside of the State. As the Court said, "(a) construction of the Due Process Clause which said, place impossible or impractical obstacles in the way could not be justified." See 306 U. S. at pp. 313, 314.

Against this interest, the court held that it must balance the individual interests sought to be protected by the Fourteenth Amendment, and that that interest is defined by the holding that " 'The fundamental requisite of due process of law is the opportunity to be heard'." (citing *Grannis* v. *Ordean,* 234 U. S. 385, 394.) See 306 U. S. at p. 314. A more specific statement appears later on p. 314:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer,* 311 U. S. 457; *Grannis* v. *Ordean,* 234 U. S. 385; *Priest* v. *Las Vegas,* 232 U. S. 604; *Roller* v. *Holly,* 176 U. S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean, supra,* and is must afford a reasonable time for those interested to make their appearance, *Roller* v. *Holly, supra,* and cf. *Goodrich* v. *Ferris,* 214 U. S. 71. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' *American Land Company* v. *Zeiss,* 219 U. S.

47, 67; and see *Blinn* v. *Nelson*, 222 U. S. 1, 7." PP. 314, 315 of 339 U. S.

In *Mullane* v. *Central Hanover Trust Company*, *supra*, it was held that publication by a newspaper of a proceeding to settle a fiduciary account did not represent due process, and that due process could have been accomplished by giving mailed notice to known beneficiaries. In addition, the court states at page 316:

> "Nor is publication here reinforced by steps likely to attract the parties' attention to the proceeding. It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, cf. *Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Savings Bank* v. *California*, 263 U. S. 282, or that he has left some caretaker under a duty to let him know that it is being jeopardized. *Ballard* v. *Hunter*, 204 U. S. 241; *Huling* v. *Kaw Valley R. Co.*, 130 U. S. 559. As phrased long ago by Chief Justice Marshall in *The Mary*, 9 Cranch 126, 144, 'It

> is the part of common prudence for all those who have any interest in (a thing), to guard that interest by persons who are in a situation to protect it'."

While the language contained in the above quotation indicates that the *Mullane* court would probably have made short shrift of the plaintiff's argument that posting is unconstitutional without giving additional notice by mailing it does not decide the issue. Both the district court and the circuit court held constitutional a New York repossession procedure which provides for the same steps to be taken as are required under the Kentucky statute, except that service of the notice of petition must also be made by a mailing to the tenant within one day after delivery of the petition to the tenant or a person who lives at the tenant's residence or following the affixing of notice. Therefore, *Velazquez* v. *Thompson, supra,* does not decide the issue presented here, since plaintiffs themselves are in agreement that the mailing of notice in addition to the other procedures set out in the statute would be constitutionally adequate.

While this Court is of the opinion that the New York statute is much superior to the Kentucky statute in its requirement of mailing the Court notes also that in *Velazquez* v. *Thompson,* 321 F. Supp. 34 (S.D. N.Y. 1970), at p. 40, the district court pointed out that plaintiffs' alternatives of imposing requirements of due diligence or registered-certified mail were preferable, but could not be mandated by a federal court, since due process does not require a state to adopt the optimum method of service but only a minimum standard be satisfied.

While this Court realizes that conditions have changed since the decision in *Weber* v. *Grand Lodge of Kentucky, F. & A. M., supra,* and that the regard for law seems to

have diminished in that there is undisputed testimony in this case that notices posted on the apartment doors of tenants are often removed by other tenants, the Court still does not believe that a sufficient showing of unreasonableness of opportunity to be heard has been made. In so holding, the Court takes into consideration the fact that posting only comes into play after the officer directed to serve notice cannot find the defendant on the premises or any members of the defendant's family over 16 years of age.

Coupling this understanding with the fact that the Sixth Circuit Court of Appeals has addressed itself to this problem, albeit 70 years ago, and the fact that plaintiffs have not been able to cite any case holding posting as a third method of service in forcible entry and detainer cases unconstitutional, this Court is impelled to hold that the statute is constitutional. District courts are required to follow the decisions of their circuit courts and this is a salutary rule that this Court will follow in every instance. If the appellate court believes that this rule is now unsound, then, of course, it is free to formulate a new decision and hold the statute unconstitutional.

We have this day entered our summary judgment for the defendants.

Dated: 5-18-79

(s) Charles M. Allen
Chief Judge

cc: Counsel of Record

PLAINTIFFS' REPLY MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is an action challenging the constitutionality of Kentucky Revised Statute 354.030, which allows for Service of Process by posting in forcible entry and detainer actions. The action now stands before this Court on cross-motions for summary judgment. Plaintiff submits that Defendants have mistakenly relied on a number of cases in support of their position that service by posting, without more, meets the requirements of due process.

Defendants rely on *United States* v. *Smith,* 398 F. 2d 173 (3rd Cir. 1968), as authority for their position. In *Smith,* the Court held that service by publication, along with service by first class mail to the Respondent's last known address, was constitutionally sufficient to apprise an outstate Defendant of the pendency of a divorce action against her. In upholding service, the Court noted the importance of service by mail when a Defendant cannot be personally served:

> Constructive service of process usually is made on an absent defendant by publication in a local newspaper, but since realistically the effectiveness of publication as notice is at best dubious, further efforts to give notice are required where practicable. There has therefore been increasing recognition of the obvious utility which the mails afford for communication of personal notice. *Smith, supra,* at 177.

Defendants rely similarly on *Velazquez* v. *Thompson,* 451 F. 2d 202 (2nd Cir. 1971). In *Velazquez,* the Court held that service by posting, when accompanied by service by first class mail, met the requirements of the due process clause. Thus, the Court in *Velazquez* upheld as constitutionally valid what Plaintiffs seek to establish through this action.

In *Sullivan* v. *Choquette,* 420 F. 2d 674 (1st Cir. 1969), the Court affirmed dismissal of a challenge to the Massachusetts constructive service statute, which provided for service by posting in forcible entry and detainer actions. The Court stressed that because Plaintiff received notice of the action pending against him, service by process was not constitutionally infirm insofar as it related to him:

> Service of Process in the state case was made by leaving the writ at the demised premises. In accordance with Mass. G. L. A., Ch. 223, Section 31. Plaintiff received actual notice of service from his wife who informed him of the contents of the writ over the telephone. In actions concerning rights in property within the state, due process requires only that reasonable notice and an opportunity to be heard be afforded. *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); F. *James,* Civil Procedure §12.1, 12.7, 12.11 (1965); Restatement of Judgments §32, Comments A, F, G (1942); *Wagner* v. *Wagner,* 110 U. S. App. D. C. 345, 293 F. 2d 533 (1961); *Schultz* v. *Walker,* 130 F. 2d 907 (7th Cir. 1942). While some commentators have expressed doubts as to the constitutionality of service made by simply leaving process at the last and usual place of abode, the doubts have concerned the likelihood of the defendant not receiving actual notice of the action. *James, supra,* §12.11 at 650 through 651. Since plaintiff had actual notice, we find no defect in the service of process. The District Court was therefore correct in dismissing this aspect of the complaint for failure to state a claim, and, since there has not been a favorable termination of the state

proceeding, the Court was also correct is dismissing the malicious prosecution count. *Sullivan, supra* at 676.

The Sullivan Court reserved the issue of whether service by posting would meet constitutional mandates where notice of the pending actions was not received by Defendants in those actions. In this case, no Plaintiff received notice of the forcible entry and detainer action pending against him until after Judment had been entered.

For the reasons stated above, Plaintiffs submit that the above-cited cases, relied on by Defendants in support of their motion for summary judgment, are unpersuasive. Plaintiffs therefore respectfully request this Court grant their motion for summary judgment.

Respectfully submitted,

(s) Betsy B. Swan
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Telephone: 584-1254

Attorney for Plaintiff,
Linnie Lindsey

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This case is the result of a complaint challenging the constitutionality of KRS 354.030, which reads as follows:

> Forcible entry or detainer, how notice served.—If the officer directed to service notice on the defendant

> in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the defendant's family thereon over sixteen (16) years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court.

The plaintiffs allege that service by posting, without more, is no longer reasonably calculated to inform defendants in forcible entry and detainer actions (hereinafter FED actions) of the pendency of actions against them. The defendants herein wholly disagree with plaintiffs' contention and request this Honorable Court to grant Summary Judgment in their favor.

This case is a proper one for Summary Judgment because there is no dispute as to what KRS 354.030 says. Defendants do take exception to the fact that plaintiffs have alleged that they never received *actual notice* of the FED actions pending against them. Whether or not they received actual notice cannot now be determined, but one might reasonably expect that if a person were challenging a statute such as in the instant case, they would not admit that they actually received notice. Be that as it may, the fact of actual notice is irrelevant to the question before the Court because the test under the due process clause as to the validity of notice is not whether the defendant actually receives notice, but rather whether the method used is one reasonably calculated to give actual notice. *United States* v. *Smith*, 398 F. 2d 173, 177 (1968).

The concept of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" was espoused in *Mullane* v. *Central*

Hanover National Bank, 339 U. S. 306 (1950), and defendants submit that in FED actions the *circumstances* warrant the kind of service contemplated by KRS 454.030.

The circumstances and characteristics surrounding the landlord-tenant relationship and the need for FED actions was expressed in *Lindsey* v. *Normet,* 405 U. S. 36, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972) as follows:

> There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property. Holding over by the tenant beyond the term of his agreement or holding without payment of rent has proved a virulent source of friction and dispute. We think Oregon was well within its constitutional powers in providing for rapid and peaceful settlement of these disputes. (31 L. Ed. at P. 50)

Although the *Lindsey* case, supra, did not deal with the issue of whether "posting" is sufficient notice, the defend-

ants' position is that the arguments put forth in favor of having landlord-tenant disputes settled rapidly and peacefully are applicable to having the defendants served rapidly.

One point that defendants wish to emphasize is that "posting" as a method of service is used only as a last resort. The officer of the court who serve summons in FED actions first attempt to serve the defendant personally, and second, they attempt service by leaving the summons with a member of defendant's family over sixteen (16) years of age. If a landlord has to wait until a defendant is personally served with a copy of the summons and complaint, a tenant could post-pone having to appear in court and vacate the leased premises for as long as he could dodge the process server. On the other hand, by posting a copy of the summons in a conspicuous place on the premises, the tenant is served as soon as he returns home with little or no chance to evade the service of process.

In the case of *Weber* v. *Grand Lodge of Kentucky, F. & A. M.*, 169 Fed. 522 (6th Cir. 1909), certiorari denied 30 S. Ct. 406, 215 U. S. 606, 54 L. Ed. 346, the United States Court of Appeals for the Sixth Circuit decided the very same issue which is before this Court and upheld the constitutionality of service by posting. At P. 528 the court stated:

> The purpose of notice is to give the defendant an opportunity to appear and be heard with respect to his property. The manner in which it is to be given and the time within which he may appear are subject to the discretion of the Legislature, provided always that it be of such character as to raise a reasonable presumption that the defendant, if he exercises that degree of care about his property which ordinary men do exercise, will learn of the proceeding and as to

> where and when he may defend. If the legislature provision have reasonable regard to the character of the proceeding and the probabilities that the owner of the property will be advised, it is due process . . . *The particular case we have before us, that of a tenant holding over after expiration of his term, seems to present no serious question as to the reasonableness of the manner of giving notice or the time for an appearance. There is nothing unreasonable in presuming that such a tenant would receive information by a notice posted on the doors of the premises in dispute within the time he was required to appear.* That they did so in ample time is a fact which, if of no other significance, is indicative of the reasonable character of the notice. Men, whether residents or nonresidents, are presumed to make contracts with reference to the laws of the state in which the subject-matter of the contract, if real estate, is situated. (emphasis added)

In the plaintiffs' Memorandum in Support of Motion for Summary Judgment they suggest that the case of *Shaffer* v. *Heitner,* 43 U. S. 186 (1977) impliedly overrules the *Weber* case, supra. The defendants submit that *Shaffer,* supra, does no such thing and that *Weber,* supra, is still the law in Kentucky until it is expressly overruled by this or some other Court.

In fact, whereas the *Weber* case, *supra,* dealt with the constitutionality of the constructive notice provision of the statute in FED actions, the *Shaffer* case, supra, concerned "minimum contacts" over the defendant sufficient to justify the exercise of quasi-in rem jurisdiction. In the case at bar there is no question of "minimum contacts." The defendants and the property are located in this state. In

Shaffer, supra, neither the defendants or the property were actually in the state.

In the instant case, the only question is whether the method of notice is reasonably calculated, under the circumstances, to apprise the defendants of the pendency of the actions against them. In *Weber,* supra, the Court addressed the reasonableness of the method of notice and stated:

> The particular case we have before us, that of a tenant holding over after expiration of his term, seems to present no serious question as to the reasonableness of the manner of giving notice or the time for an appearance. There is nothing unreasonable in presuming that such a tenant would receive information by notice posted on the doors of the premises in dispute within the time he was required to appear. (169 Fed. at page 528)

In *Sullivan* v. *Choquette,* 420 F. 2d 674 (1st Cir., 1969); certiorari denied 90 S. Ct. 1691, 398 U. S. 904, 26 L. Ed. 2d 62; rehearing denied, 90 S. Ct. 2237, 399 U. S. 938, 26 L. Ed. 2d 809, the Court stated:

> In actions concerning rights in property, within the state, due process requires only that reasonable notice and an apportunity to be heard be afforded. *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); F. James, Civil Procedure §§ 12.1, 12.7, 12.11 (1965) Restatement of Judgments § 32, comments a, f, and g (1942); see *Wagner* v. *Wagner,* 110 U. S. App. D. C. 345, 293 F. 2d 533 (1961); *Schulte* v. *Walker,* 130 F. 2d 907 (7th Cir. 1942). (420 F. 2d at Page 676)

In *Velazquez* v. *Thompson*, 451 F. 2d 202 (1971), the plaintiffs, who were all New York City apartment dwellers who were evicted from their apartments because of non-payment of rent, challenged the statutory scheme for summary eviction. The New York statute is quit similar to the statute herein and the court found that it "clearly comp1ie[d] with due process requirements." (491 F. 2d at Page 204)

The *Velazquez* case, supra, was cited with approval by the District Columbia Court of Appeals in *Westmoreland* v. *Weaver Brothers, Inc.*, 203 A. 2d 506 (1972), wherein the Court stated:

> *We also disagree with appellants contention that service by posting violated constitutional due process requirements.* The adequacy of notice for due process purposes depends on whether it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their obpections." *Mullane* v. *Central Hanover Bank and Trust Company*, 339 U. S. 306, 314, 70 S. Ct. 652, 657, 94 L. E. 865 (1950). In a landlord-tenant action for possession of premises "[i]t is to be noted initially that since this is an action to recover the possession of premises occupied by a person who is resisting removal, his whereabouts are obviously fixed and easily determinable. Thus the usual problem of serving a person whose present residence is unknown, which gives rise to much of the constitutional litigation . . . is absent." *Velazquez* v. *Thompson*, 451 F. 2d 202, 205 (2d Cir. 1971). *In such a suit, we cannot say that service by posting is not reasonably calculated to give the tenant notice of the pending action and therefore there is no*

constitutional infirmity. (295 A. 2d at pages 509-510) (emphasis added)

In summary, the defendants contend that they are entitled to a judgment as a matter of law because KRS 454.030 is reasonably calculated to give defendants in FED actions notice of the pendency of actions against them and the opportunity to present their objections. Furthermore, the statute has been upheld as constitutional by the Sixth Circuit Court of Appeals in *Weber* v. *Grand Lodge of Kentucky, F. & A. M.,* supra, and similar challenges, to the service by posting is constitutional.

For the above stated reasons, defendants request that the Motion for Summary Judgment be granted in their favor.

Respectfully submitted,

J. Bruce Miller
Jefferson County Attorney

By: (s) William L. Hoge, III
(by Scott M. Miller)
Assistant County Attorney
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ANSWER

Come the Defendants, Joseph B. Greene, Jr., Sheriff of Jefferson County, Kentucky, and his Deputy Sheriffs, by counsel, and for their answer state as follows:

FIRST DEFENSE

The Complaint fails to state a cause of action upon which relief may be granted against the Defendants, and each of them.

SECOND DEFENSE

1) Defendants admit so much of paragraph 86 as to KRS 454.030 stating that in a forcible entry and detainer action when there is no one at the Defendant's home the constable may serve the notice by posting a copy thereof in a conspicuous place on the premises; but deny the remainder of paragraph 86.

2) Defendants are without sufficient knowledge as to paragraphs 1 thru 85, inclusive, and therefore, deny the same.

3) Defendants deny the allegations made in paragraphs 87 and 88 of the Plaintiff's Complaint.

WHEREFORE, Defendants, Joseph B. Greene, Jr., and his Deputy Sheriffs, demand as follows:

1) That the Complaint be dismissed with prejudice as to all of the plaintiffs;

2) Their costs herein expended, including a reasonable attorney fee;

3) Trial by jury on all issues so triable; and;

4) Any and all other relief to which Defendants may appear to be entitled.

J. Bruce Miller
Jefferson County Attorney

By: (s) William L. Hoge, III
(by Scott M. Miller)
Assistant Jefferson County Attorney
Counsel for Defendants, Joseph B. Greene, Jr., and his Deputy Sheriffs
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PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by counsel, move this Court to declare that Kentucky Revised Statute 454.030, insofar as it provides for constructive service by posting in forcible entry and detainer actions, is unconstitutional as applied to plaintiff class because it is not reasonably intended to inform class members of the pendency of actions against them.

Plaintiffs further move this Court to certify their class as follows:

> All tenants of Jefferson County, Kentucky who are Defendants in state court forcible entry and detainer actions involving property in Jefferson County, Kentucky and who have been served copies of the summons for these actions by means of posting, pursuant to KRS §454.030.

Plaintiff's Motion for Summary Judgment

Plaintiffs further move this Court to enjoin Defendant Joseph Greene, Sheriff of Jefferson County, Kentucky, and his agents and employees, and defendant S. Carter Bacon, Deputy Sheriff for Jefferson County, Kentucky, and various unnamed defendants, who are Deputy Sheriffs for Jefferson County, Kentucky, and who serve process in forcible entry and detainer actions, from failing to serve notice on members of plaintiff class by First Class Mail, addressed to plaintiffs at the premises which are subject to the actions, within twenty-four (24) hours after service by posting.

This Motion is made pursuant to Federal Rules of Civil Procedure 56 and 57. Plaintiffs rely on their Verified Complaint, various depositions, and the attached Memorandum in support of this motion.

Respectfully submitted,

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Betsey B. Swan
Attorney for Plaintiffs
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Louisville, Kentucky 40202
584-1254

PLAINTIFFS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs Linnie Lindsey, Barbara Hodges, and Pamela Ray, tenants of housing owned and operated by the Defendant Housing Authority of Louisville (hereafter H.A.L.), brought this action challenging both policies and practices of H.A.L. and the constitutionality of constructive service,

pursuant to KRS 454.030, in forcible entry and detainer (hereafter F.E.D.) actions. The parties to this action entered an Agreed Order with respect to those issues concerning the challenged policies and practices of H.A.L., and the suit was dismissed as to Defendants Harris, Beard, Todd, and Thomas.

The sole issue left for resolution is whether Kentucky Revised Statute 454.030, which allows for service of process by posting in forcible entry and detainer actions, is constitutional on its face and whether Kentucky Revised Statute 454.030 is constitutional as applied to Plaintiff class. The issues presently stand before this Court on Plaintiffs' Motion for Summary Judgment.

II. FACTS

In 1975, forcible entry and detainer actions were filed against Plaintiffs Lindsay and Hodges in the Second Magisterial District Court of Jefferson County, Kentucky. In 1975, a forcible entry and detainer action was filed against Plaintiff Ray in the First Magisterial District Court of Jefferson County, Kentucky. In each of the above cases, service of process was made by posting a copy of the Summons in a conspicuous place on the premises, according to information contained in the Sheriff's returns for each action. In each of the above cases, defendants therein (and plaintiffs herein) did not receive actual notice of the proceedings pending against them; and, in each of the above cases, default judgments were entered against defendants therein.

For purposes of their challenge to KRS 454.030, plaintiffs represent a class composed of those tenants who are, or will in the future be, Defendants in forcible entry and detainer actions filed in Jefferson County, Kentucky and

who have been or will be served a copy of the summons by means of posting pursuant to KRS 454.030.

III. KENTUCKY REVISED STATUTE 454.030, WHICH ALLOWS PROCESS IN FORCIBLE ENTRY AND DETAINER ACTIONS TO BE SERVED BY POSTING, IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT VIOLATES PLAINTIFFS' DUE PROCESS RIGHTS SECURED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Kentucky Revised Statute 454.030 provides for constructive service of process in forcible entry and detainer actions:

> 454.030. Forcible entry or detainer, how notice served. —If the officer directed to serve notice on the Defendant in forcible entry or detainer proceedings cannot find the Defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the Defendant's family thereon over sixteen (16) years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court.

Plaintiffs submit that KRS 454.030 is unconstitutional on its face. Service by posting, without more, is no longer reasonably calculated to inform Defendants of the pendency of actions against them.

The United States Constitution provides that no person shall be deprived of life, liberty or property without due

process of law. E.g., *Goldberg* v. *Kelly*, 397 U. S. 254 (1970). The right to peaceful possession and enjoyment of property has long been recognized as fundamental. *Lynch* v. *Household Finance Corp.*, 405 U. S. 538 (1972). *Shelley* v. *Kraemer*, 334 U. S. 1 (1947). When an owner conveys a leasehold interest in reality, the tenant becomes the owner of the right to possession of that property, an interest which is less than a fee and subject to certain conditions. *Dan Cohen Realty Co.* v. *National Savings and Trust Co.*, 125 F. 2d 288, *affirming* 36 F. Supp. 536 (W.D. Ky. 1941), *Pikeville Oil and Tire Co.* v. *Deavors*, 320 S. W. 2d 782 (Ky. 1959). Thus, any attempt to divest a tenant of his right to possession is subject to the due process requirements of the Fourteenth Amendment.

Due Process mandates that a Defendant be given reasonable notice of actions pending against him. *Mullane* v. *Central Hanover National Bank*, 339 U. S. 306 (1950). Although this axiom is easily stated, courts have encountered considerable difficulty in its application. See e.g., Mullane, *supra; Schroeder* v. *City of New York*, 371 U. S. 208 (1962); *Walker* v. *City of Hutchinson*, 352 U. S. 112 (1956). The *Mullane* Court, set forth the adjudicatory standard by which sufficiency of notice is measured:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance, . . . But if with due regard for the practicalities and peculiar-

ities of the case these conditions are reasonably met the constitutional requirements are satisfied. Mullane, supra, at 314-315.

Before applying the above standard to the case at bar, it is necessary to understand both the historical and theoretical underpinnings of the notice doctrine and the extent to which these underpinnings have been undercut by recent litigation. Development of the requirement of notice to party Defendants has been inextricably intertwined with developed of territorial jurisdiction as a limitation on the power of state courts. See e.g., Toward a General Theory of State Court Jurisdiction, Geoffrey C. Hazard, Jr., 1965 S. Ct. Law Rev. 241, 258-262. Much of the difficulty encountered in defining reasonable notice has been engendered by the historical distinction between *in personam* and *in rem* jurisdiction. Notice to party Defendants first became problematic in the eighteenth century when service of process replaced the *capias* in *courts* of common law and equity, and judgments were first entered against absent Defendants by default. Hazard, *supra* at 248. Default judgments were primarily issued incident to foreign attachments, employed by Plaintiffs faced with absconding debtors. Hazard, at 249; Drake, a Treatise on Suits by Attachment in the United States §§ 67, 72 (1st ed., 1854).

This procedure was somewhat less than satisfactory, however, because debtors could set aside default judgments by showing they had not absconded. Hazard, *supra* at 249, Courts were thus placed in a position of qualifying the need for personal service as a prerequisite to valid, binding judgments or of leaving a class of Plaintiffs without remedy against those Defendants who could not be personally served. Hazard, *supra* at 250. The response was widespread adoption of a theoretical framework which recog-

nized that constructive notice was required to bring the Defendant personally before the Court, but that no notice was required for *in rem* proceedings because attachment of the *res* was sufficient notice of the pending action. *The Mary*, 9 Cranch 126 (1815). In *The Mary*, Chief Justice Marshall stated:

> [N]otice of the controversy is necessary in order to become a party, and it is a principle of natural justice . . . that before the rights of an individual be bound by a judicial sentence, he shall have notice *either actual or implied*, of the proceeding against him. *Where these proceedings are against the person notice is served personally, or by publication; where they are in rem, notice is served upon the thing itself.*" (Emphasis added.) *The Mary, supra* at 144.

Thus, in the early Nineteenth century the Supreme Court had established a dual standard of notice based on the *rem/personam* distinction.

At the same time state courts were coming to terms with the notice issue, they were also called upon to articulate theories limiting their territorial jurisdiction. Hazard, *infra* at 258. Justice Story first articulated the theory of territorial jurisdiction in his treatise, Commentaries On the Conflict of Laws (1834):

> [E]very nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect, and bind directly all property, whether real or personal, within its territory; and all persons, who are resident within it, whether natural born subjects, or aliens . . .

> [N]o state or nation can, by its laws, directly affect, or bind property out of its own territory or persons not resident therein, whether they are natural born subjects, or others. This is a natural consequence of the first proposition.

In the case of *Pennoyer* v. *Neff*, 95 U. S. 714 (1877), Justice Field adopted Story's theory of territorial jurisdiction as a solution to the notice problem. Hazard, *supra* at 262. Unlike Story, however, Field reasoned that notice was important only insofar as it related to the court's power to exercise control over the Defendant or his property. Thus, notice lost its independent constitutional dimension in *Pennoyer*.

The somewhat complicated fact situation in *Pennoyer* was as follows. Neff instituted an action against Pennoyer for recovery of land, acquired under a U. S. patent and located in Oregon. Pennoyer denied Neff's title and right to possession and set up his own right to the title by virtue of a Sheriff's sale to enforce an Oregon judgment in which Neff was the unsuccessful Defendant. Prior to initiation of Neff's action, Mitchell had instituted an action in the state of Oregon against Neff, an out of state resident, for unpaid attorney's fees. Service was by publication because Neff had property in Oregon. The Oregon notice statute provided for personal service if the Defendant was a nonresident and the action concerned real property within the State. Service was to be by publication with a copy of the Summons sent to Defendant at his place of residence, unless the residence was not known and could not be ascertained. Mitchell obtained a default judgment and executed it by Sheriff's sale of Neff's property, which was purchased by Pennoyer. In granting relief to Neff, the Supreme Court held the first judgment void for the following reasons, the

Oregon Court had no power to exercise personal jurisdiction over non-residents. Therefore, jurisdiction over Neff, never attached. Likewise the Oregon Court never obtained jurisdiction over Neff's property because jurisdiction over property attached only through sequestration of that property prior to judgment.

In his opinion, Justice Field reiterated the theory of territorial jurisdiction first propounded by Story.

> The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself, the civil *status* and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, c. 2; Wheat.

> Int. Law, pt. 2, c. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jursist, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that on tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decision. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, Confl. Laws, sect. 539, *Pennoyer, supra,* at 722-723.

Field then carried Story's theory further by equating notice with power to adjudicate. Notice was the physical manifestation of the Court's power. Conversely, because notice was solely a measure of the Court's power, the need for notice and the type of notice which the Court could give were *ipso facto* limited by the power of the Court to exercise its jurisdiction:

> If, without personal service, judgments *in personam,* obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. *Pennoyer, supra* at 726.
>
> Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property

> is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the actions is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the Defendants that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability. *Pennoyer, supra* at 727.

Thus, the *Pennoyer* court held that seizure of property constituted notice to the Defendant by adopting the fiction that an owner is always in possession of his property. When combined with the fact that process could run into another state, this doctrine prohibited the state from providing

more suitable notice than that arising from seizure of property.

The legacy of *Pennoyer* is threefold: (1) that there is a limit to the reach of state court process; (2) that seizure of property is notice; (3) that the state court's power to act and the type of notice which must be given are determined by the *personam/rem* distinction. *Hazard, supra,* at 272.

Over the past one hundred years, the Supreme Court has chipped away at this legacy. *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), overruled that part of *Pennoyer* which held there was a limit to the reach of state court process. The court, while upholding the power of a state to exercise jurisdiction over a non-resident corporation on the basis of its minimum contacts with the state, overturned judgment for inadequate service. The state's constructive service statute provided for service on out of state corporations by mailing service to the Secretary of State. Service was held fatally defective because the Secretary of State had no duty to notify the defendant corporation of the pending action.

A series of Supreme Court decisions have overturned the legal fiction that seizure of property, prior to the initiation of legal action, constitutes sufficient notice of that action. See, e.g., *Mullane* v. *Central Hanover Bank and Trnst, supra; Schroeder* v. *City of New York, supra; Walker* v. *City of Hutchinson, supra.* The following cases, read together, stand for the proposition that no proceeding will lie against a person readily locatable, unless that person is notified, at a minimum, by regular mail. *Hazard, supra* at 277.

The Supreme Court held, in *Shaffer* v. *Heitner,* 43 U. S. 186 (1977), that the state's power to act and the type of

notice required must be determined independently of the *rem/personam* distinction. In *Shaffer,* shareholders of a Delaware corporation initiated a derivative action against the corporation's officers and directors, all of whom resided out of state and had no contacts with the state. Plaintiffs obtained jurisdiction by attaching all stock held by the corporation and its officers and directors. This was possible because Delaware was the fictional situs of stock issued by Delaware corporations. All defendants were notified of the pending action by certified mail. The Court below held that it was not necessary to employ the minimum contacts test of *International Shoe, supra,* because the *quasi in rem* nature of the action provided the court with an independent basis for jurisdiction. The Supreme Court reversed, holding that the court's exercise of jurisdiction over defendants who did not have minimum contacts with the state violated defendants' Fourteenth Amendment rights. Thus, the court abandoned the territorial fiction, as a requisite for jurisdiction, in favor of the fundamental fairness, minimum contacts test of *Mullane. Shaffer, supra,* at 4854. Central to its holding was the recognition that an adverse judgment *in rem* directly affects the property owner by divesting him of property rights before the court. *Shaffer, supra* at 4854.

Although the Supreme Court has held that notice to the defendant has constitutional significance, independent of the state's power to act, it has never addressed the issue of adequacy of notice which is given to an in-state defendant and which, although more likely to reach him than notice by publication, is less likely to reach him than personal service or service by mail. See *International Shoe, supra; Mullane, supra; Robinson* v. *Hanrahan,* 409 U. S. 38 (1972); *Schroeder, supra; Walker, supra.* Lower courts

have measured the adequacy of notice to in state defendants in light of the *rem/personam* distinction. See e.g., *Pelletier* v. *Northbrook Garden Apartments*, 233 Ga. 208, 210 S. E. 2d 722 (1974); *Weber* v. *Grand Lodge of Ky., F. & A. M.*, 169 Fed. 522 (6th Cir. 1909).

In *Weber, supra,* the Sixth Circuit upheld the constitutionality of service by posting in F.E.D. actions. In sustaining the manner of service, the court analogized service by posting to service by publication.

> The matter involved is real estate situated within the state. If the tenant does not reside upon the premises, or cannot be found there because he resides out of the state, why may not the state provide how the notice in a proceeding against such a tenant shall be served? That it is within the power of a state to provide for giving constructive notice to nonresidents through publication, and thereby obtain jurisdiction to determine the right and interest of any such nonresident in real estate situated within the boundaries of the state, is now too well settled by repeated decisions of the Supreme Court. Such a method is essential to the determination of titles and constitutes due process, if the publication pursues the statute and the notice is of a character which presumptively gives knowledge of the proceeding and affords reasonable time to appear and defend. *Weber, supra* at 527.

The holding of *Shaffer, supra,* by implication overrules the court's holding in *Weber, supra.* With abolition of the *rem/personam* action as a limitation on the state court's power to act, notice fully assumes the independent constitutional dimension it enjoyed prior to *Pennoyer, supra.*

Moreover, Kentucky's adoption of the Uniform Residential Landlord Tenant Act, KRS 383.505. *et seq.*, has

taken the F.E.D. action out of the realm of the *in rem* action by giving the tenant a right to counterclaim for violations of the leasehold agreement. KRS 383.645. If notice of the proceedings does not reach a Defendant, his right to raise the implied warranty as a defense or counterclaim to the eviction action is lost.

This court must determine whether the notice by posting is reasonably calculated to inform Defendants of the action against them. *Mullane, supra; Walker, supra.* This determination is made by consideration of three distinct factors: first, the private interest that will be affected by the type of notice; second, the risk of deprivation of this interest through the procedures employed and the value of additional procedural safeguards; third, the government's interest, including the fiscal and administrative burdens that an additional or substituted procedural requirement would entail, *Matthews* v. *Eldridge,* 42 U. S. 315 (1976).

Applying the above test to notice by posting, it is clear that posting, without more, is not reasonably calculated to inform Defendants of the pendency of F.E.D. actions against them. The Defendant's interest in notice of actions against him is inseparable from his interest in defending against those actions:

> . . . The requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corrollary to one of the most fundamental requisites of due process — the right to be heard. *Schroeder,* at 212.

The present adequacy of notice by posting must be evaluated in light to the realities of contemporary society rather than by standards which existed at the turn of the century

when *Weber* was decided. The United States Supreme Court has long recognized the need to account for changing societal norms in its application of constitutional guarantees to different factual situations:

> . . . while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.
>
> *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387 (1926).

The bucholic rural life confronting the *Weber* court has fallen to the complexity and congestion of present urban environments. While service by posting was reasonably calculated to reach Defendants at the turn of the century, the same is not true today.

Service by posting creates a substantial risk that the Defendant will not receive notice of the action against him. Posting cannot guarantee against the possibility that the summons will be blown away, ripped down by small children or otherwise taken from the attention of the tenant who is being threatened with imminent eviction. See Deposition of Nicholas A. Weber, Jr., Q. 48-49 at 25; Deposition of of S. Carter Bacon, Qs. 51-57 at 109-110; Deposition of Gilbert A. Brutscher, Q. 31 at 119-120; Deposition of Boyd Morris, Qs. 50-55 at 149-150, Q. 72 at 153. Moreover, it cannot guarantee against the possibility of posting at the wrong address or of a posting at the right address, but on the wrong apartment door. See Deposition of John L. Linville, Qs. 35-42 at 79-81. The Supreme Court in *Walker* took judicial notice of the fact that service by publication rarely informed a landowner of proceedings aaginst his

property. *Walker, supra*, at 116. The Sixth Circuit in *Weber* analogized service by posting to service by publication. *Weber, supra* at 527. Similarly, this court is free to take judicial notice of the hazards endemic in service by posting. Plaintiffs submit that, when service is by posting, a copy of the summons must be mailed to Defendant's last known address before service conforms to the mandates of due process. This additional procedural safeguard would overcome the shortcomings of notice by posting. Notice would be deposited in the tenant's mailbox and, thus would not be subject to the vagaries of weather or neighborhood children. Furthermore, the possibility of posting on the wrong door would be alleviated with additional service by mail. It cannot be said that the additional requirement of mailing a summons to the Defendant would place an undue fiscal or administrative burden on the government. The cost would be that of a first class stamp. The administrative burden would be no more than the time required to address an envelope to Defendant.

The above recommendation finds support in the case of *Palmer* v. *Columbia Gas of Ohio, Inc.*, 479 F. 2d 153 (6th Cir. 1973). Plaintiffs challenged the Columbia Gas Co.'s utility termination procedures as violative of due process in that Plaintiffs received, *inter alia*, no notice of the actual termination. The Sixth Circuit held that due process required personal notice, by phone, of the termination, absent phone contact, notification by certified mail, return receipt requested was required. In *Palmer*, Plaintiffs stood to have their utilities terminated. In the case at bar Plaintiffs stand to be evicted from their homes. Justice requires that the notice used in F.E.D. proceedings be as likely to inform Plaintiffs of those proceedings as the notice ordered by the court in utility terminations.

Service by posting is not reasonably calculated to inform the Defendant of the pendency of an action against

him when that action may result in a personal judgment being entered against Defendant. *Womble* v. *Commercial Credit Corporation,* 231 Ga. 208, 210 S. E. 2d 722 (1974). In light of *Shaffer,* the holding of *Womble* is equally applicable to the case at bar. While Plaintiffs do not suggest that personal service is constitutionally mandated in all F.E.D. actions, they do suggest that when posting is employed additional service by first class mail is required. This requirement minimizes the dangers inherent in posting, without creating an additional financial or administrative burden for the government. As such it is the minimum necessary to comply with the due process clause of the United States Constitution.

For the reasons stated above, Plaintiffs respectfully submit that this Court must declare KRS 454.030 unconstitutional insofar as it permits constructive service by posting in forcible entry and detainer actions.

Respectfully submitted,

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Attorney for Plaintiffs

DEPOSITION FOR PLAINTIFFS

The depositions of Douglas L. Dowery, Nicholas A. Weber, Jr., Thomas R. Fowler, William M. Yates, William F. Kern, Jr., John L. Linville, S. Carter Bacon, Gilbert A. Brutscher, Prescott G. Hansford and Boyd Morris were taken in behalf of the plaintiffs, Linnie Lindsey,et al., before Betty M. Wilson, Notary Public for the State of Kentucky at Large, at the office of Hamilton, Milliman, Schwartz and Hoge, Suite 400, 100 East Liberty Street, Louisville, Jeeffrson County, Kentucky, on February 24, 1978, at the hour of 10:00 a.m. Said depositions were taken pursuant to notice for purposes of discovery and as provided by Federal Rule of Civil Procedure.

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pulled it because in those areas you cannot, you know, use a gun—

Q. 35. Uh-huh.

A. —because of the crowds of people.

Q. 36. Okay. Have you ever had to leave the job because of threats, or just go away without completing the business that you had to do?

A. Yes, I have.

Q. 37. Did that happen often?

A. Well, we had to get them—call a backup and call for somebody else to help us out.

Q. 38. Uh-huh. Did you ever have problems when you were serving Writs for Forcibles?

A. Yes. Not—not on Forcibles, the Writs. Just set-outs.

Q. 39. When you went into the Public Housing Projects were the addresses always marked on the buildings?

A. Yes and no.

Q. 40. Could you explain that, please?

A. Sometimes they would, but the

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next time they would be ripping them off so that they wouldn't—I imagine because they didn't want to get a paper. But we knew, you know, we knew that they ripped them off because we had been down there so many times and knew exactly, you know, just where the house was.

I am talking specifically about Village West.

Q. 41. All right. So occasionally when you served Writs at Village West, there were not numbers on many of the buildings?

A. Yeah, but we would go from one — in other words, if you had a 25 on the next one, then you could fig-

ure out that the next one was going to be 28, or 26, or—you know, in other words, you would look at the front and check the back.

Q. 42. Okay. Now I don't know very much about the set up of Village West. Are there a number of apartments within each address?

Just to give you an example, if you had to serve a Writ at 2500, are there apartments A, B, C, and D?

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it off. Or sometimes you couldn't get a—it was a metal door and you couldn't get a thumbtack in it. You used scotch tape.

Q. 48. Did you ever run into problems getting the Writ to stick in cases where you had metal doors and had to use scotch tape, because of the weather or anything like that?

A. On occasions we have had to put them inside the door, or had to slip them inside the door.

Q. 49. So there have been—

A. The children—we had problems with children. They would take them off.

They never took them off when we were present, but we, you know, assume—the Housing Authority told us that they would take them off, so we always put them up high. So we never had any problems with that.

Q. 50. Okay. Who from the Housing Authority told you that children would take them off?

A. I just—I don't—you know, I don't know exactly who said anything. I just

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remember them at one-time or another saying that "Make sure that you put them up high because the kids, when they come in, will rip them off."

Q. 51. Were you told this more than one time?

A. I don't remember.

Q. 52. Okay. Did you have more problems during a certain time of the year than at other times? Were there any particular weather conditions that made it more difficult to post the Forcibles?

A. Weather conditions always made a job hazardous, the steps and ice and all of that.

Q. 53. Uh-huh. Was it more difficult to get the Forcibles to stick in the winter?

A. No, because like I say, if we could thumbtack it up or put it inside the door, we didn't have any problem whatsoever.

Q. 54. Did you ever notice any particular types of weather conditions that made it more difficult if you had to use scotch tape to get the Writ—

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a house that has been divided into apartments where you have not been able to get in the front door§

A. Once or twice.

Q. 70. All right. And what did you do in those cases?

A. If I couldn't get a hold of the manager or the apartment—I put in on the door in the front. If I knew this apartment was upstairs, I would check with the neighbor next door and make sure that they lived there and make sure that they had a—that that was their entrance and that was the only way they could get up.

Q. 71. Okay.

A. And sometimes I came back later on and tried it again.

Q. 72. How many days would there be between the time that the Writ for a Forcible Action was issued and the time you went to trial, or the time—

A. Well, as soon as we got the Forcibles or the Writs we went out that day or the next day. So I would say they had a good week or so to whatever—I—I mean, I can't recall,

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A. One time. I thought I was going to get eat up, but I didn't. It scared me to death.

Q. 35. What were you trying to do when the dog attacked you?

A. Trying to keep him off of me. What would you do?

Q. 36. Did you ever hear anything about First Mag which would indicate that people sometimes didn't get the Writs that were posted?

A. I don't have any recollection of that, no.

Q. 37. Okay. What percentage of the Writs in Forcible Actions that you personally served would you say you ended up serving by posting them?

A. Oh, I would say a good percentage. I wouldn't want to break it down, but a good percentage of them were posted.

Q. 38. Was it a majority?

A. Yes.

Q. 39. Okay. Would you say it was at least 75 percent?

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A. That would be a pretty close estimate.

Mr. Hoge: Object to the form of the question and move to strike any answer. Now that is a leading question.

Witness: Yeah. I don't want to get into percentages. I would rather not, because I didn't multiply them out.

Ms. Swan: Withdraw the question.

Q. 40. When you posted the Writs in Forcible Actions, how did you do it?

A. Well, we—the method I generally used was scotch taped to the door—

Q. 41. Were there—

A. —both top and bottom.

Q. 42. Okay. Were there certain seasons in which you had more difficulty scotch taping, getting the scotch tape to stick than others?

A. Never had any problem through December 31st.

Q. 43. Okay. Did you ever try to post a Forcible with scotch tape and not have the

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getting them?

A. I don't think so, not unless they got on a chair to reach up and get them, or if they were taller than I.

Q. 42. Uh-huh. Why was it that you even worried about the children getting at them?

A. Well, there's a lot of children around those apartment complexes, and you can't tell just what they might do.

Q. 43. Have you ever seen a child tearing one down?

A. No.

Q. 44. Okay. Do you use thumbtacks and scotch tape?

A. And scotch tape, yes, ma'am.

Q. 45. What determined whether you used a thumbtack or the scotch tape?

A. Well, some doors were iron doors that you couldn't thumbtack.

Q. 46. Uh-huh.

A. Or they would be a real hard wood that you couldn't put a thumbtack in them, and then we would scotch tape them at four different

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yet.

Q. 29. Okay.

A. But there is places down there with the numbers—they change the numbers on you.

Q. 30. Uh-huh. They do change the numbers?

A. Oh, yeah. They will change the numbers. They will even take the paper off the door where you put it and put it on somebody else's door and say, "Hey, I didn't get no paper."

Q. 31. Have you seen people doing that?

A. Why, yes. We have caught them doing it. And we also—we have had complaints where other people would call in and say that so and so brought the paper over and put it on my door.

Q. 32. How many complaints have you had of that happenning?

A. Oh, Lord. Let's don't get into that, honey. My God, when you are talking about these housing projects, you are—they are unreal.

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Q. 33. How many complaints would you say you have had, a lot?

A. Oh, I don't know. I would be afraid to say on something like that. We — not numerous of complaints, no, but enough that it makes you wonder.

Q. 34. When you get these complaints, have you ever had people just call in and complain that they have not gotten the —

A. Oh, yeah. And then we have had people that have called in and said that it is on my door and so and so down the street put it on my door. So we would go get it and put it on the right door again.

Q. 35. Have you ever had a case where the person who electively put it on the other, on the second door was not the person who had the Forcible Action?

A. You mean we put it on the wrong door?

Q. 36. No, that wasn't what I meant. What I meant was, have you ever served a Writ on say Person A, okay?

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available to me?

A. I believe I still have them.

Ms. Swan: All right. Bill —

Mr. Hoge: If we have them.

Ms. Swan: Okay. So you will —

Witness: You should have them. Yeah, you should have them. No problem to get them.

Ms. Swan: — will agree to produce them if they are available?

Mr. Hoge: Yeah.

Ms Swan: Okay.

Witness: So now then I also, in my district, before we were evicted, as I call it — we got evicted too, you know.

Ms. Swan: I know.

Witness: We had served over eight thousand Forcibles and Writs in ten months of last year, of '77. The last ten months of '77 we had served over eight thousand.

Q. 60. How many men were serving these?

A. We had six deputies.

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housing, where did you — if you had to post the Writ, where did you post it?

A. On the door.

Q. 47. Whereabouts on the door?

A. Well, depending on the type door it was.

Q. 48. Uh-huh. How did it change with the type of door?

A. Well, some of them had a glass, a little glass on the door, and some of them had — were wooden doors.

Q. 49. Uh-huh. Where did you post it on a door that had glass?

A. On the glass with the tape, usually.

Q. 50. Okay. Uh-huh. Where did you post it on a wooden door?

A. Well, close to the doorknob or up, usually closer — tried to get it up so some child wouldn't get ahold of it and pull it off.

Q. 51. Did you ever see kids pulling them off?

A. Yes.

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Q. 52. You did?

A. Uh-huh.

Q. 53. Did you see many?

A. No, not too many. I did see it in one place over there.

Q. 54. Where was that?

A. Village West.

Q. 55. How many times did you see that happen?

A. Well, probably a couple of times.

Q. 56. Did you ever get complaints from people who claimed they hadn't received the Writs?

A. Yes.

Q. 57. Did you get many complaints?

A. Not too many.

Q. 58. Can—did the people come in or did they call your office, or how did you get those complaints?

A. Well, sometimes they would call or — well, I guess is what they would do, they would call.

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that I was delivering those Writs to the proper place.

Q. 23. I see. Now in Village West did every apartment have a separate number?

A. I can't really recall. I think so, but I am not sure.

Q. 24. Okay, Did you have to serve some of these Writs by posting them on the door?

A. No. The way I served Writs, I always endeavored to knock on the door to find some person there that was of reasonable age and discretion to deliver, hand deliver it to the party who answered the door.

Q. 25. Uh-huh.

A. And if there was no one answering the door, on that occasion we slid them into the crack between the door and the doorjamb. I did that on all of those that weren't accepted physically.

Q. 26. Whereabouts on the door did you slide it in?

A. Between the jamb and the door, itself.

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Q. 46. Uh-huh.

A. If the door was wood, I would — if I could use a thumbtack, I would.

Q. 47. Uh-huh.

A. And if I didn't, I used tape, you know.

Q. 48. Whereabouts on the door did you usually put the Writ?

A. Well, I would try to put them — well, you know, about the middle of the door or a little further, like that.

Q. 49. Uh-huh. Did you try to put them in particular place?

A. Oh, I didn't just pick no place. They didn't have no certain place to put them, I mean on the door. But

I just didn't put them down at the bottom. I put them on the door. But we didn't have no certain place for it, or they didn't tell me if we did.

Q. 50. Okay. Were you aware of there being any problem with children ripping the Writs off?

A. Oh, we had plenty of trouble.

[150]

Q. 51 You had trouble?

A. With kids, yeah. Yeah.

Q. 52. Did you ever see kids ripping them off?

A. Yeah. I have seen them take them off of the door and I would go back and tell them to put it back. They don't know. They didn't know. They just —

Q. 53. How did they react when you told them that?

A. The kids?

Q. 54. Yeah.

A. They just put them back. That's all. You know, they are just — kids is like that.

Q. 55. Were there any particular places where you saw kids ripping them off the doors?

A. Well, most of that was in Village West.

Q. 56. Okay.

A. You have more trouble down there with kids than anywhere, I think.

Q. 57. Why is that, do you know?

[153] * * *

Q. 70. Have you ever received complaints from people saying that they hadn't received the Writs in FED's?

A. Well, the office has. The office has.

Q. 71. Have you personally received those types of complaints?

A. No. No. Not in eight years I haven't, no.

Q. 72. Okay. Have you ever had any problem when you go to scotch tape a Writ on the door with the scotch tape not sticking?

A. Oh, occasionally.

Q. 73. What do you do?

A. Well, I just put more tape on it. Make it a little bit more secure, you know, because sometimes the tape will, you know — but if we had good tape, usually it stuck. At least when I got away from there it was up there.

Q. 74. What?

A. It was up there — when I put it up there, it was up there, you know.

Q. 75. Have you served any Writs in

COMPLAINT

PRELIMINARY STATEMENT

(1) Plaintiffs, in this class action, seek to have this Court declare invalid and enjoin the enforcement of numerous illegal policies and practices of the Defendants. First, the Plaintiffs seek to enjoin the enforcement of a policy and practice of the Defendants whereby they no longer accept monthly rental payments offered or tendered on a late basis by tenant residents. Plaintiffs seek to enjoin the enforcement of said illegal policy through forcible entry and detainer (hereafter FED) eviction actions in the magistrate courts of Jefferson County, Kentucky. Plaintiffs also seek to have this Court declare invalid and enjoin the enforcement of Defendant's policies and practices which fail to properly give notice to public housing tenants of their rights to a grievance hearing prior to the institution of FED eviction actions in state court, and to

further provide such hearings. Plaintiffs also seek to enjoin Defendants from failing to properly abide by the thirty (30) day written notice provisions required by the model Lease, the Defendants' lease, and the Kentucky statutory and case law. Additionally, Plaintiffs seek to enjoin Defendants from improperly assessing against public housing tenants FED court costs, regardless of the outcome of such FED court action, and prior to the institution of such FED court action. Finally, the Plaintiffs seek a declaration that that portion of Kentucky Revised Statutes (hereafter K.R.S.) §454.030 which allows for posting of an FED summons is unconstitutional. All of the Defendants' illegal actions, policies and practices are challenged on the grounds that they violate the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States, United States Housing Act of 1937, as amended, 42 U.S.C. §§1401, *et seq.,* the Housing and Community Development Act of 1974, 42 U.S.C. §§1437, *et seq.,* 42 U.S.C. §§1983 and 1985(3) and various rules and regulations promulgated by the Secretary of Housing and Urban Development (hereafter HUD), particularly HUD circulars 7465.8 and 7465.9.

JURISDICTION

(2) This action arises under the Constitution and laws of the United States, particularly including the Fifth and Fourteenth Amendments to the Constitution, the United States Housing Act of 1937, as amended, 42 U.S.C. §1401, *et seq.,* the Housing and Community Development Act of 1974, 42 U.S.C. §1437, *et seq.,* and regulations promulgated thereunder, and 42 U.S.C. §1983 and 1985(3). The matter in controversy, exclusive of interest and costs, exceeds $10,000 as to the Plaintiffs by virtue of the expected value

of a long-term tenancy in public housing at lower-than-market rents. Jurisdiction is conferred on this Court by 28 U.S.C. §§1331, 1337, 1343(3) and 1343(4). Declaratory relief is sought pursuant to 28 U.S.C. §§2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

PARTIES

(3) Plaintiff, LINNIE LINDSEY, is a citizen of the United States and a resident of the City of Louisville, County of Jefferson, Kentucky. She is a public housing tenant at the Parkway Place Project of the Housing Authority of Louisville, Kentucky, residing at 1202 "B" Brashear Drive.

(4) Plaintiff, BARBARA HODGENS, is a citizen of the United States and a resident of the City of Louisville, County of Jefferson, Kentucky. She is a public housing tenant at the Parkway Place Project of the Housing Authority of Louisville, Kentucky, residing at 1719 "F" Patton Court, #44.

(5) Plaintiff, PAMELA RAY, is a citizen of the United States and a resident of the City of Louisville, County of Jefferson, Kentucky. She is a public housing tenant at the Clarksdale Housing Project of the Housing Authority of Louisville, Kentucky, residing at 619 Marshall Court.

(6) Plaintiff, LOUISVILLE WELFARE COUNSELING STOREFRONT, INC., (hereafter "Storefront") is a local nonprofit organization incorporated in 1973 in Kentucky to provide counseling for low income people in obtaining services and financial aid from state, federal and/or local agencies, and to educate low income people about the procedures and laws governing these agencies. The Storefront's membership is comprised of poor persons in receipt of welfare and other forms of financial assistance, as well as others concerned about the problems of inadequate income. Many of

its members are residents of public housing who have been, who are, and who will be injured by the policies and practices of the Defendants which are complained of herein.

(7) The Plaintiff, LOUISVILLE WELFARE RIGHTS ORGANIZATION, is an affiliate of the National Welfare Rights Organization, whose stated purpose is to aid and assist members in securing their statutory rights under various federal and state assistance programs. Many of its members are residents of public housing who have been, who are, and who will be injured by the policies and practices of the Defendants which are complained of herein.

(8) Plaintiff, RUTH M. ARMSTRONG, is the acting president of the Storefront, and the Louisville Welfare Rights Organization. She and her seeing-eye dog are residents of public housing, residing in the Sheppard Square Housing Project, at 519 "B" East Jacob Street.

(9) Plaintiff, TENANTS UNION, INC., is a nonprofit, membership corporation under the laws of the Commonwealth of Kentucky with the power to sue and be sued. As an organization, it has continually engaged in litigation and educational activity in an effort to provide better housing for tenants in Louisville and Jefferson County, Kentucky. Many of its members are residents of public housing who have been, who are, and who will be injured by the policies and pratcices of the Defendants which are complained of herein.

The Tenants Union, Inc., has counselors and is currently involved in counseling private housing and public housing tenants as to their rights and responsibilities as tenants. The Tenants Union, Inc., has a direct and personal interest in making sure that fair and equitable standards for grievances and evictions are available to all public housing tenants in Louisville, Kentucky. Plaintiff CAROL THOMAS

is a coordinator for the Tenants Union, Inc., which has its office at 1018 South Seventh Street, in Louisville, Kentucky.

(10) Defendant HOUSING AUTHORITY OF LOUISVILLE (hereafter "HAL") is a political subdivision of the City of Louisville and the State of Kentucky created under the authority of Chapter 80 of the K.R.S. to provide decent, safe and sanitary living accommodations for persons who lack the amount of income that is necessary without financial assistance to obtain such accommodations. K.R.S. 80.050 authorizes the Public Housing Commission of any city, including HAL, to sue and be sued. HAL administers low rent public housing projects constructed pursuant to the United States Housing Act of 1937, as amended, 42 U.S.C. §1401, *et seq.* and regulations promulgated thereunder with funds supplied by the United States Department of Housing and Urban Development (hereafter HUD).

(11) Defendant DONALD L. HARRIS, who is sued individually and in his official capacity, is the Executive Director of the Defendant HAL. In such capacity, he is responsible for all actions, policies and practices of the Defendant HAL.

(12) Defendant D. W. BEARD, who is sued individually and in his official capacity, is the Administrator of Community Development of the Defendant HAL. In such capacity, he sets forth and implements the policies and practices of the Defendant HAL herein complained of.

(13) Defendant HARRY W. TODD, who is sued individually and in his official capacity, is the Development Manager at the Parkway Place Project of the Defendant HAL with an office at 1622 B South 13th Street, Louisville, Kentucky. In such capacity, he sets forth and implements

the policies and practices of the Defendant HAL herein complained of.

(14) Defendant LAWRENCE THOMAS, who is sued individually and in his official capacity, is the Development Manager at the Clarksdale Project of the Defendant HAL, with an office at 413 Jefferson Street, Louisville, Kentucky. In such capacity, he sets forth and implements the policies and practices of the Defendant HAL herein complained of.

15) Defendants, BOYD MORRIS and S. CARTER BACON are deputy constables and Defendants JEFF A. MCINTYRE is a constable for the Jefferson County Second Magisterial District Court. They are authorized to serve FED summonses. Defendant BACON allegedly posted an FED summons on Plaintiff HODGENS's door and Defendant MORRIS allegedly posted an FED summons on Plaintiff LINDSEY's door, pursuant to K.R.S. §454.030. Defendants BACON and MORRIS at all times, were acting in the scope of their employment and as agents for Defendant MCINTYRE.

(16) Defendant PRESCOTT HANSFORD is a deputy constable and Defendant JOHN CRAWFORD is a constable for the Jefferson County First Magisterial District Court. They are authorized to serve FED summonses. Defendant HANSFORD allegedly posted an FED summons on Plaintiff RAY's door, pursuant to K.R.S. §454.030. Defendant HANSFORD at all times, was acting in the scope of his employment and as an agent for Defendant CRAWFORD.

CLASS ACTION

(17) This action is brought by Plaintiffs LINDSEY, HODGENS and RAY in their own behalf and on behalf of all other persons similarly situated under Rule 23 (a), (b)(1) and (2) of the Federal Rules of Civil Procedure. Plaintiffs LINDSEY, HODGENS and RAY represent the five classes

(A, B, C, D & E) which are articulated in the next paragraph. As to each class, the class represented is so numerous that joinder of all members is impractical; there are questions of law and fact common to all members of the class; the claims of the Plaintiffs are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; and the party opposing the class has acted on grounds generally applicable to the class thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

(18) Pursuant to Rule 23(c)(4), the named Plaintiffs LINDSEY, HODGENS and RAY are representatives of five classes of Plaintiffs articulated in paragraphs 19 through 23.

(19) Class A consists of those Louisville, Kentucky public housing tenants who have tendered, are tendering, or will tender late rent, but have had or will have such tender refused by Defendant HAL or its agents.

(20) Class B consists of those Louisville, Kentucky public housing tenants who have not or will not properly receive(d) notice of grievance hearing procedures and/or have not properly received a grievance hearing prior to initiation of a state court FED eviction action.

(21) Class C consists of those Louisville, Kentucky public housing tenants who have had or will have a state court eviction action brought against them, in spite of Defendant HAL's noncompliance with thirty (30) day written notice provisions required under Federal and/or state law, including the Kentucky Uniform Residential Landlord/Tenant Act, K.R.S. §383.505 *et seq.*

(22) Class D consists of those Louisville, Kentucky public housing tenants who have been charged, are being

charged or will be pre-charged by Defendant HAL for court costs prior to a FED eviction judgment being rendered by a court of law, or prior even to the filing of such FED action.

(23) Class E consists of those Louisville, Kentucky tenants who are, have been or will be defendants in state court FED actions and who have been allegedly served a copy of the summons by means of posting pursuant to K.R.S. §454.030.

FACTUAL ALLEGATIONS AS TO PLAINTIFF LINDSEY

(24) Plaintiff LINDSEY has been and continues to be a resident of HAL's public housing for the past twelve (12) years, currently residing in premises located at 1202 "B" Brashear Drive, in the project designated as Parkway Place in Louisville, Kentucky.

(25) At all times up to and including the month of September, 1975 Plaintiff LINDSEY has paid to HAL all lawful rents, late charges and assessed court fees.

(26) Plaintiff LINDSEY was unable to pay her October, 1975 and November, 1975 rents on time, as her AFDC monies and checks for those months were stolen.

(27) Plaintiff LINDSEY apprised Defendant TODD of this theft of her monies, and she explained to him that this was the reason for her inability to pay her rent on time.

(28) On Monday, November 10, 1975, Plaintiff LINDSEY went to the office of Defendant TODD, accompanied by Mr. Darryl Blakemore of the Louisville Tenants Union, Inc., and tendered $62.00 (said sum having been borrowed from Plaintiff LINDSEY's mother) to cover her monthly rental payments of $31.00 each for the months of October, 1975 and November, 1975.

(29) Plaintiff LINDSEY's tendered payment was refused by agents of the Defendants pursuant to an arbitrary decision by Defendant TODD not to accept the tendered payment.

(30) Defendant TODD and his agents, in refusing to accept the late payment, were acting pursuant to HAL's formal policy of not accepting such late rents even when tendered. This policy is set out in Plaintiff's Exhibits A and B, respectively the June 17, 1975, and the October 13, 1975, resident bulletins signed by Defendant BEARD. These Exhibits are attached hereto and are incorporated herein by reference as if fully set out.

(31) Until November of 1975, Plaintiff LINDSEY had paid her monthly rent late on many occasions and on all occasions such late payment was accepted by the Defendants. This included payment of or about $80.00 which was accepted by the Defendants in September of 1975. The first time that the tender of payment was refused was in November, 1975.

(32) As a result of the failure to accept the tendered late rent and as a result of HAL's policy embodied in Plaintiff's Exhibits A and B, Defendant HAL instituted an FED eviction action numbered 12594 in the Jefferson County Second Magisterial District Court. The judgment of "GUILTY" which was entered in such FED eviction action on November 7, 1975, was taken by default.

(33) On November 12, 1975, Defendant TODD executed a military affidavit regarding Plaintiff LINDSEY in such FED eviction action, which was filed in the Recorder's Office of the Second Magisterial District Court, Jefferson County, Kentucky, on November 14, 1975.

(34) Plaintiff LINDSEY was never informed by the Defendants of her rights to notice and a grievance hearing,

pursuant to HUD regulations, at any time prior to institution of this suit.

(35) The court file in FED action #12594 indicates that deputy constable Boyd Morris served the FED summons on October 30, 1975 by posting a copy of the same on the front door of Plaintiff Lindsey's apartment. In actuality, Plaintiff Lindsey never received the FED summons. She first discovered that an FED action was pending against her when, on November 17, 1975, she discovered a Writ of Possession in this action, on the floor inside the door, where it had apparently fallen after being put through the mail slot in her door.

(36) Said Writ of Possession ordered Plaintiff Lindsey to vacate her apartment by November 20, 1975 or be set out at that time.

FACTUAL ALLEGATIONS AS TO PLAINTIFF HODGENS

(37) Plaintiff Hodgens has been and continues to be a resident of HAL's public housing since April of 1973, currently residing in premises located at 1719 "F" Patton Court, #44, in the project designated as Parkway Place, Louisville, Kentucky.

(38) At all times up to and including the month of September, 1975 Plaintiff Hodgens has paid to HAL all lawful rents, late charges and assessed court fees.

(39) In almost three years of residence in public housing, Plaintiff Hodgens has paid her rent late only once prior to October 1975, and has never previously been served with notice of an FED action by the Defendant.

(40) Plaintiff Hodgens has however, in the past been charged for court costs of $4.00 for an alleged filing of an FED action. (See attached Exhibit C). Upon information

and belief, it is a pattern and practice of the Defendant HAL and its agents to pre-assess such costs prior to the filing and or entry of judgment in FED actions, all in clear violation of Section II of the HAL lease which is attached hereto as Exhibit D. Exhibits C and D are incorporated herein by reference as if fully set out.

(41) Plaintiff HODGENS encountered financial difficulties and was unable to pay her rent on time for the months of October, 1975, and November, 1975.

(42) As a result of HAL's policy embodied in Plaintiff's Exhibits A and B, Defendant HAL instituted an FED eviction action numbered 12588 in the Jefferson County Second Magisterial District Court. The judgment of "GUILTY" which was entered in such FED eviction action on November 7, 1975, was taken by default.

(43) On November 12, 1975, Defendant TODD executed a military affidavit regarding Plaintiff HODGENS in such FED eviction action, which was filed in the Recorder's Office of the Second Magisterial District Court, Jefferson County, Kentucky on November 14, 1975.

(44) Plaintiff HODGENS was never informed by the Defendants of her rights to notice and a grievance hearing, pursuant to HUD regulations, at any time prior to institution of this suit.

(45) The court file in FED action #12588 indicates that deputy constable S. CARTER BACON served the FED summons on October 30, 1975 by posting a copy of the same on the front door of Plaintiff HODGENS' apartment. In actuality, Plaintiff HODGENS never received the FED summons. She first discovered that an FED action was pending against her when, on November 17, 1975, she discovered a Writ of Possession in this action, on the floor inside the

door, where it had apparently fallen after being put through the mail slot in her door.

(46) Said Writ of Possession ordered Plaintiff HODGENS to vacate her apartment by November 20, 1975 or be set out at that time.

FACTUAL ALLEGATIONS AS TO PLAINTIFF RAY

(47) Plaintiff RAY has been and continues to be a resident of HAL's public housing since May of 1975, currently residing in premises located at 619 Marshall Court in the project designated as Clarksdale in Louisville, Kentucky.

(48) At all times up to and including the month of September, 1975 Plaintiff RAY has paid to HAL all lawful rents, late charges and assessed court fees.

(49) Plaintiff RAY was unable to pay her October, 1975 and November 1975 rents on time, as her AFDC monies and checks for those months were held up at the Post Office because of a change of address.

(50) Plaintiff RAY apprised Defendant THOMAS of this hold up of her monies, and she explained to him that this was the reason for her inability to pay her rent on time.

(51) On Tuesday, November 18, 1975 Plaintiff RAY called the office of Defendant THOMAS and tendered $52.00 to cover her monthly rental payments of $26.00 each for the months of October, 1975 and November, 1975.

(52) Plaintiff RAY's tendered payment was refused by agents of the Defendants pursuant to an arbitrary decision by Defendant THOMAS not to accept the tendered payment.

(53) Defendant THOMAS and his agents, in refusing to accept the late payment, were acting pursuant to HAL's formal policy of not accepting such late rents even when tendered. This policy is set out in Plaintiff's Exhibits A and B, respectively the June 17, 1975 and the October 13,

1975 resident bulletins signed by Defendant BEARD. These Exhibits are attached hereto and are incorporated herein by reference as if fully set out.

(54) Plaintiff RAY had paid her monthly rent late on a prior occasion, on or about July of 1975, and on that occasion, such late payment was accepted by the Defendants. The first time that the tender of payment was refused was in November, 1975.

(55) As a result of the failure to accept the tendered late rent and as a result of HAL's policy embodied in Plaintiff's Exhibits A and B, Defendant HAL instituted an FED eviction action numbered 68762 in the Jefferson County First Magisterial District Court. The judgment of "GUILTY" which was entered in such FED eviction action on October 28, 1975, was taken by default.

(56) Plaintiff RAY was never informed by the Defendants of her rights to notice and a grievance hearing, pursuant to HUD regulations, at any time prior to institution of this suit.

(57) The court in FED action #68762 indicates that deputy constable PRESCOTT HANSFORD served the FED summons by posting a copy of the same on the front door of Plaintiff RAY's apartment. In actuality, Plaintiff RAY never received the FED summons. She first discovered that an FED action was pending against her when, on November 18, 1975, she discovered a Writ of Possession in this action, on the floor inside the door, where it had apparently fallen after being put through the mail slot on her door.

(58) Said Writ of Possession ordered Plaintiff RAY to vacate her apartment by November 21, 1975 or be set out at that time.

ADDITIONAL FACTUAL ALLEGATIONS RELATING TO ALL PLAINTIFFS

(59) Prior to the publication of Plaintiff's Exhibits A and B and prior to several months before such publication, the Defendants have had a long standing policy of accepting late rental payments when tendered with the late payment and court costs included. The Defendants changed this policy without notice to the Plaintiffs and the public housing tenants and the Defendants did not give the Plaintiffs and other public housing tenants a hearing or an opportunity to comment on this change of policy prior to implementing such change of policy.

(60) The court cost of $4.00 for the FED eviction action was assessed against the Plaintiffs by Defendants prior to a successful verdict evicting Plaintiffs and in fact such cost was assessed prior to the filing of a state court FED eviction action.

(61) The state court eviction actions against Plaintiffs were each filed prior to the expiration of the thirty (30) day notice letter (Plaintiff's Exhibit F pertaining to Plaintiff HODGENS) and the FED eviction trial date of November 7, 1975, is also prior to the expiration of the thirty (30) day period. Section 10 of Plaintiffs' lease states, in pertinent part, that "management may terminate this lease at any time by giving the tenant not less than thirty (30) days notice . . ." Such lease is attached hereto as Plaintiff's Exhibit D and incorporated herein by reference.

(62) On information and belief, even though the Defendants changed policy regarding non-acceptance of late rent precludes any acceptance of such late rent, Defendant TODD and Defendant THOMAS and other project managers have unlimited and absolute discretion to accept or not accept late rental payments. For example, Defendant TODD

did accept late rent payment from Plaintiff LINDSEY for the month of September, 1975 and Defendant THOMAS did accept late rental payments from Plaintiff RAY on or about July, 1975.

(63) On information and belief, the changed policy not to accept late rental payments is a result of the motivations and actions of the Defendants, individually and in concert, to evict lower paying tenants from public housing in order to be able to rent to higher paying tenants and in order to increase the revenues of Defendant HAL and make Defendant HAL more fiscally solvent.

(64) The Plaintiffs and all members of the Plaintiffs' class are suffering immediate and irreparable harm in that they are being, have been and stand to be unlawfully deprived of their dwelling places. The Plaintiffs have no adequate remedy at law.

(65) Plaintiffs LINDSEY and RAY stand ready to pay and have continuously tendered the October, 1975 and November, 1975 late rental payments, since November 10, 1975.

(66) On October 29, 1975, counsel for the Plaintiffs signed and hand delivered to Defendant HARRIS and HAL's attorney, the letter and attachments which are marked Plaintiff's Exhibit E, which is attached hereto and incorporated herein by reference as if fully set out.

(67) The October 29, 1975 letter and attachments pointed out a number of the illegal actions of the Defendants as applied to JACQUELINE DONAND, a client of the Legal Aid Society of Louisville, Inc., and a public housing tenant at the Sheppard Square project of HAL.

(68) No written response or acknowledgement of the October 29, 1975 letter and attachments has ever been received by counsel for the Plaintiffs. Nor have any actions been taken by the Defendants to remedy the illegalities

pointed out in Exhibit E. One of the HAL attorneys, Frank Thiemann, has contacted Plaintiff's counsel and agreed to set up a meeting to discuss the issues involved in this lawsuit.

(69) As LILLIAN HUDSON, Development Manager at the Sheppard Square project in Louisville, Kentucky, accepted a late tender of rent from JACQUELINE DONAND, the FED action against JACQUELINE DONAND in Second Magisterial District Court, Jefferson County, Kentucky, number 12536, was remanded from the docket on November 14, 1975.

FIRST CAUSE OF ACTION

(70) The Defendants' long standing policy of accepting late rental payments from public housing tenants if tendered prior to an FED set-out order cannot be changed in a manner inconsistent with due process and requirements of HUD regulations.

(71) Such a long standing policy of a governmental agency cannot be changed without procedural due process in the form of adequate notice and the opportunity for those affected to be heard at a meaningful time and in a meaningful manner.

(72) Plaintiffs' right to notice and a meaningful hearing is also specifically required under HUD regulations relating to lease and grievance procedures, 24 C.F.R. part 866; as published at 40 Federal Register 33402-33408 (August 7, 1975).

(73) Defendants have violated Plaintiffs' rights under the due process clause of the 14th Amendment to the United States Constitution and under the HUD regulations.

SECOND CAUSE OF ACTION

(74) The Defendants' change of long standing policy in no longer accepting rental payments violates the equal protection clause of the 14th Amendment to the United States Constitution in that it discriminates against those such as the named Plaintiffs who are the poorest tenants and who are the tenants most likely to be late on any particular month's rental payment.

(75) The new policy of non-acceptance of tendered late rent violates the language and intent of the Housing Act of 1937, as amended, 42 U.S.C. §1401, *et seq.*, the Housing and Community Development Act of 1974, 42 U.S.C. §1437, *et seq.*, and the Sixth Circuit Court of Appeals opinions in *Fletcher* v. *Housing Authority of Louisville* (491 F. 2d 793 and the presently unreported opinion dated October 24, 1975 case number 73-1466).

(76) The Defendants' change of policy is an illegal attempt to circumvent *Fletcher* and to institute and implement an income mix rent range in an unlawful manner.

THIRD CAUSE OF ACTION

(77) The Plaintiffs and their classes have been denied equal protection and due process under the 14th Amendment of the United States Constitution by the Defendants' policies and practices whereby each development or project manager is given complete and unbridled discretion to decide on his or her own, including for his or her own personal reasons, whether or not late payments will be accepted.

(78) The Plaintiff tenants are not given a due process hearing as to whether or not there are sufficient reasons to justify the acceptance of a late payment; additionally, this

unbridled and discriminatory discretion unreasonably and invidiously creates two classes of tenants—those favored by the acceptance of late rent and those like Plaintiffs whose late rental payment was not accepted.

FOURTH CAUSE OF ACTION

(79) The non-acceptance of late rental money tendered and the immediate initiation by Defendant HAL of state court FED eviction actions is contrary to, and prohibited by, lease and grievance procedures required by Defendant HUD to be effected by Defendant HAL, 40 Federal Rgister 33402-33408 (August 7, 1975), including 24 C.F.R. §886.4(1)(l), which provides:

> that the PHA shall not terminate or refuse to renew the lease other than for *serious or repeated* violation of material terms of the lease such as failure to make payments due under the lease or to fulfill the tenant obligations set forth in §886.4(f) or for other good cause. (Emphasis added).

(80) The non-acceptance of tendered late rent policy is contrary to mandates of HUD regulations and the HUD Model Lease, which are binding upon the Defendants, and which state that the Defendants must accept rent money without regard to other charges.

FIFTH CAUSE OF ACTION

(81) The Defendants have denied the Plaintiffs their rights under the due process clause, the Housing Act of 1937, as amended, 42 U.S.C. §1401, *et seq.* and HUD regulations by not properly abiding by the thirty (30) day written notice provisions required prior to initiation of

FED eviction proceedings. This illegal action by the Defendants violates the HUD Model Lease, the Defendants' own lease provision (see section 10 of Plaintiff's Exhibit D) and Kentucky statutory and case law, including the Kentucky Uniform Residential Landlord and Tenant Act, K.R.S. §383,505, *et seq.*

SIXTH CAUSE OF ACTION

(82) The Defendants have a policy or practice of pre-charging and assessing Plaintiffs and their class with court costs for initiation of a state court FED action prior to the initiation of suit, prior to judgment being rendered in each action, and regardless of the outcome of such judgment.

(83) Such pre-charging of court costs is violative of the Model Lease and the Dwelling Lease of Defendant HAL, which provides in Section 2 (Amount and Due Date of Rental Payments):

> *If it is necessary to institute eviction proceedings,* the tenant agrees to pay all costs incurred by Management *for each successful legal action taken if judgment is rendered in favor of Management.* (Emphasis added.)

Pre-charging of court costs is in fact a prohibited lease provision, HUD circular 7465.6, and 24 C.F.R. §886.6(h), 40 FED. REG. 33406 (August 7, 1975).

(84) Such pre-charging of court costs is also violative of the due process and equal protection clauses of the 14th Amendment, HUD regulations and it also constitutes a false, misleading and deceptive act and practice in violation of K.R.S. §367.170.

SEVENTH CAUSE OF ACTION

(85) The Defendants have not provided Plaintiffs LINDSEY and HODGENS and RAY and their class with effective notice of the right to a grievance hearing prior to eviction nor has such a hearing been held, although requested in a timely and appropriate manner. Such lack of notice and hearing violates the due process clause of the 14th Amendment, the Housing Act of 1937, as amended, 42 U.S.C. §1401, *et seq.* and HUD regulations, in particular, HUD circular 7465.9.

EIGHTH CAUSE OF ACTION

(86) In all Kentucky lawsuits, except for FED eviction actions, the Defendants must be personally served with a copy of the summons and Complaint. K.R.S. §454.030 specifically states that in an FED action when there is no one at the Defendant's home, the constable "may serve the notice by posting a copy thereof in a conspicuous place on the premises."

(87) K.R.S. §454.030 creates an arbitrary and unreasonable classification and is unconstitutional as being violative of the equal protection clause of the 14th Amendment. It is also violative of the due process clause of the 14th Amendment as it is not reasonably calculated to provide notice of the pending action. Posting also constitutes an unconstitutional invasion of the right of privacy by alowing anyone who comes to the Plaintiffs' doors, prior to the Plaintiffs, the opportunity to read unproven allegations which subsequent adjudication may determine to be completely untrue.

NINTH CAUSE OF ACTION

(88) The Defendants have acted in concert and conspiracy in violation of 42 U.S.C. §1985(3) in depriving the Plaintiffs of their statutory, regulatory and constitutional rights.

WHEREFORE, the Plaintiffs, on behalf of themselves and their classes, respectfully demand that this Court:

a) Assume jurisdiction of this case and certify as soon as practicable that it may be maintained as a class action as to classes A, B, C, D and E, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure;

b) Order, through temporary restraining orders, preliminary injunctions, permanent injunctions and declaratory judgment that:

   i. the defendants' change of long standing policy whereby they no longer accept late rental payment is illegal and the defendants are enjoined from not accepting late rental payments from public housing tenants;

   ii. the defendants' implementation of a rent mix formula whereby they consistently evict lower paying tenants in order to get higher paying tenants into the projects is illegal and such practice is enjoined;

   iii. The defendants' practice of instituting FED eviction actions prior to the expiration of the thirty (30) day written notice period is illegal and is hereby enjoined;

   iv. the defendants' failure to give adequate notice of the right to a grievance hearing and the failure to grant such grievance hearings upon timely

requests is illegal and the defendants are enjoined from such practices; and,

v. the defendants' policy and practice of pre-charging and assessing court costs for FED eviction actions prior to the institution of such action and prior to judgment being rendered in such action is illegal and such practices are hereby enjoined.

c) Enter a declaratory judgment declaring that that portion of K.R.S. §454.030 which allows for posting in FED actions is illegal and unconstitutional, as being in violation of the equal protection and due process clauses of the 14th Amendment;

d) Order by temporary restraining order and preliminary and permanent injunctions that defendants may not evict the named Plaintiffs and that they may not institute state court FED eviction actions and set out public housing tenants from their homes after the tenant has tendered late rent or made reasonable explanation of the circumstances necessitating the late payment of rent;

e) Grant Plaintiffs' costs and reasonable attorney's fees; and,

f) Grant Plaintiffs all equitable and/or other relief to to which they may be entitled.

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By: (s) Kurt Berggen, Attorney at Law
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Motion to Dismiss or Affirm

Office-Supreme Court, U.S.
FILED
SEP 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-341

SUPREME COURT OF THE UNITED STATES

October 1981 Term

JOSEPH GREENE and
UNKNOWN DEPUTY SHERIFFS - - Appellants

versus

LINNIE LINDSEY,
BARBARA HODGENS and
PAMELA RAY - - - - - - Appellees

Appeal from the Court of Appeals
for the Sixth Circuit

MOTION TO DISMISS APPEAL, OR IN THE ALTERNATIVE, TO AFFIRM JUDGMENT

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SUPREME COURT OF THE UNITED STATES

October 1981 Term

No. 81-341

JOSEPH GREENE and
UNKNOWN DEPUTY SHERIFFS - - *Appellants*

v.

LINNIE LINDSEY,
BARBARA HODGENS and
PAMELA RAY - - - - - - *Appellees*

APPEAL FROM THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT

Pursuant to Rule 16.1(a), Appellees, by counsel, move this Court to dismiss the appeal by Joseph Greene and unknown Deputy Sheriffs for their failure to file a conforming jurisdictional statement.

In the alternative, and pursuant to Rule 16.1(c)(d), Appellees, by counsel, move this Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit. The basis for this affirmance is that it is manifest that the question presented is so unsubstantial as not to need further argument.

STATEMENT

Lindsey, Hodgens and Ray filed a complaint alleging that they had been, inter alia, deprived of due process of law due to their failure to receive or have notice of a Writ of Forcible Entry and Detainer. The purpose of said Writ is to notify them that their landlord, the Housing Authority of Louisville, had initiated an action to evict them from their homes. Collectively, Appellees had resided in their apartments for over fourteen (14) years.

Lindsey, Hodgens and Ray each learned of their eviction only after default judgment had been entered against them and their set-out by the sheriff was imminent.

After an adverse decision by the Federal District Court, a reversal was obtained by the Circuit Court of Appeals for the Sixth Circuit. Joseph Greene initiated this appeal to the Supreme Court of the United States.

ARGUMENT

Lindsey, Hodgens and Ray seek alternative relief as permitted by Rule 16. They assert that Joseph Greene has filed a non-conforming jurisdictional statement which should result in its dismissal, or in the alternative, that the judgment of the Sixth Circuit be affirmed.

Specifically, the Statement was improperly styled; the official citation of *Lindsey* v. *Greene,* 649 F. 2d 425

(1981) was omitted in violation of Supreme Court Rule 15.1(d); the verbatim account of the relevant section of the Fourteenth Amendment was omitted in violation of Supreme Court Rule 15.1(f); Supreme Court Rule 15.1(j) was not complied with in that the items required for the appendix are not in proper order, and the notice of appeal in the appendix does not conform to Supreme Court Rule 15.1(j)(iv).

Regarding the proper style, the Sixth Circuit ruled *against* Greene and, therefore, it is he who would be the Appellant, not Lindsey, Hodgens and Ray (hereinafter "Appellees").

Rule 15.2 and Rule 33.2 require ". . . (4) the caption of this case, as *appropriate* in this court . . ." to be provided (emphasis added). Joseph Greene's jurisdictional statement has himself listed as an "Appellee", and Lindsey, Hodgens and Ray are listed as "Appellants".

Additional procedural errors, as briefly noted above, are as follows.

Supreme Court Rule 15.1(d) requires Appellants to reference the official report of any opinion delivered in the courts below. The official citation for the Sixth Circuit as given above, was not provided in the jurisdictional statement.

As is evident from even the most cursory review of the jurisdictional statement, due process is an issue on appeal. Yet Appellants failed to provide a verbatim account of the relevant portion of the Fourteenth Amendment. See Rule 15.1(f).

The final two (2) procedural errors involve the appendix to the jurisdictional statement. Said appendix is inconsistent with Supreme Court Rule 15.1 (j) because the decision of the Sixth Circuit is not in its proper place. Also, the notice of appeal provided in the appendix does not show the date it was filed. See Rule 15.1(j)(iv).

Because of this nonconformity, the appeal of Joseph Greene and unknown deputy sheriffs should be dismissed. See Rule 16.1(a), Rule 15.2, Rule 33.7.

In the alternative, Appellees request that the decision of the United States Court of Appeals for the Sixth Circuit be affirmed. See Rule 16.1(c)(d).

The basis for the affirmation is as follows: first, it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument; that is, the well-reasoned judgment of the Sixth Circuit is consistent with decisions of this Court; second, in the circuits there is no split as to what is required to provide notice to tenants in a manner consistent with due process; third, Joseph Greene has failed to show that compliance with the judgment of the Sixth Circuit would cause the Commonwealth of Kentucky any significant burden and compliance with the Circuit Court decision is readily and easily ascertainable.

The first reason why further argument is not needed is because the Sixth Circuit conducted an extensive historical analysis of due process and the merging, for due process purposes, of actions in rem and in personam. See *Mullane* v. *Central Hanover Bank and*

Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), *Shaffer* v. *Heitner*, 433 U. S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977). Following the direction provided by this Court, the Circuit Court was able to note that significant changes have occurred regarding due process. The watershed of change was *International Shoe Co.* v. *Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

This Court recognized that for the concept of due process to remain conducive to an ever-changing society and theory of justice, perspicuous changes consistent of same would be required.

The Circuit Court correctly analyzed that its earlier decision of *Weber* v. *Grand Lodge of Kentucky*, 169 F. 522 (6th Cir.) cert. denied 215 U. S. 606, 30 S. Ct. 406, 154 L. Ed. 346 (1909) relied upon cases which were no longer consistent with *International Shoe, supra.* Rather than incorrectly relying on outmoded precedent, the Sixth Circuit reversed itself in a manner which is readily acknowledged as consistent with the current test applied to due process; this is, notice which, given all circumstances, is reasonably calculated to notify the tenant of the pending litigation. See *Velazquez* v. *Thompson*, 451 F. 2d 202 (2nd Cir. 1971); *Mullane, supra; Walker* v. *City of Hutchinson*, 352 U. S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956); *Schroeder* v. *City of New York*, 371 U. S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962); *Shaffer* v. *Heitner, supra.*

The second reason why no additional argument need be had is because, as stated above, there is not a split amongst the circuits. Previously the Second Cir-

cuit in *Velazquez, supra,* and now the Sixth Circuit, have both ruled that something more than mere posting of Writs in tenant-landlord matters is required to meet the requirements of due process.

Finally, the Jurisdictional Statement failed to show how the Sixth Circuit decision would in any way burden the Commonwealth of Kentucky. Compliance with the circuit court opinion is easily attainable. In dicta, the Sixth Circuit suggested that if posting is going to be the mode of service, that mailing of an additional copy be provided to ensure that notice be reasonably calculated under all circumstances to provide the tenant with notice of the upcoming proceeding. Contrary to the unlikely prospect of service avoidance raised by Appellant, the decision of the Sixth Circuit would protect against the all more likely prospect, indicated by this record, of a lack of notice. As pointed out by the Sixth Circuit, there were occasions when the Writs, through no fault of those "served," did not remain on the property. Concerning those occasions, the Deputy Sheriffs indicated they would never even bother to re-post another copy of the Writ. Therefore, some tenants, like Appellees herein, were never served, and never had actual notice. The Sixth Circuit did not require actual notice; all it required was to have a reasonably calculated possibility of notice and to ensure that the Writs were served in a manner consistent with due process.

All the Commonwealth of Kentucky needs to do to comply with the Sixth Circuit decision is to mail, via

first class, a copy of the Writ where substituted service is used and personal service may not be had.

The logical and easily attainable manner of compliance is an amendment allowing for mailing which would be added when substituted service is used. Thus, when posting of the Writ is used as substituted service, the court clerk will then mail, via first class mail, a copy of this Writ. As noted by the Sixth Circuit, the Second Circuit upheld the "nail and mail" statute of New York. See *Velazquez, supra.*

The consequence of not requiring "nail and mail" has ramifications beyond the possessory interest in real estate. Under the application of Kentucky law,[1] in three (3) cities and two (2) counties, a landlord may request a judgment for rental payment *with* an action for possession. Such possibility presents an additional compelling reason why due process requires substituted service beyond the mere posting of a Writ of Forcible Entry and Detainer.

In addition to the arguments which support the court's decision in *Lindsey* v. *Greene,* 649 F. 2d 425 (1981), the Jurisdictional Statement should not persuade this Court that plenary consideration is needed. In the Statement the *Velazquez* decision is discussed, and then Appellant states:

> ". . . the New York statute is quite similar to the statute herein and the Court found that it 'clearly complied with due process requirements' " (at page 8).

---

[1]K.R.S. 383.685. Cities of Louisville, Lexington, Covington. Counties of Jefferson, Fayette.

Lest this Court be misled, the New York statute has an all-important addition; when posting is the manner of service used, a copy of the Writ is *also* mailed, via certified or registered mail to the tenant. Appellees assert that it is this additional provision which allowed the statute to pass constitutional muster. Even the District Court in its opinion notes that the New York statute is "much superior" to K.R.S. 454.030 in its requirement of mailing.

Additionally, the remarks in Greene's Jurisdictional Statement about any precedential value of *Westmoreland* v. *Weaver Brothers,* 293 A. 2d 506 (1972) are sadly misplaced. A complete reading of that case will show that the tenant received a rehearing because of questionable service via posting and remarks of the *Westmoreland* court relating to manner of service were dicta.

CONCLUSION

Appellees assert that the reasons stated herein require an affirmation of the Sixth Circuit Court of Appeals.

However, in the alternative, a dismissal of this appeal is well within the reasonable discretion of this Court.

Respectfully submitted,

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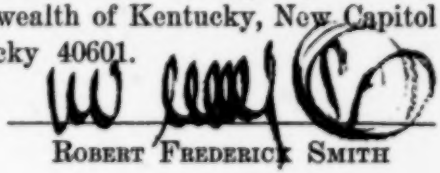
PROOF OF SERVICE

I hereby certify that three (3) true copies were this 10th day of September, 1981, mailed, postage prepaid, to counsel for Appellants, J. Bruce Miller, Esquire, William L. Hoge, Esquire, 1112 Kentucky Home Life Building, Louisville, Kentucky 40202; and to Gail Leeco, Esquire, Attorney General's Office, Commonwealth of Kentucky, New Capitol Annex, Frankfort, Kentucky 40601.



ROBERT FREDERICK SMITH

Appellant's Brief

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 81-341

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOSEPH GREEN and
UNKNOWN DEPUTY SHERIFFS - - Appellants

vs.

LINNIE LINDSEY,
BARBARA HODGENS and
PAMELA RAY - - - - - - - Appellees

Appeal from the United States Court of Appeals
for the Sixth Circuit

BRIEF OF APPELLANTS

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QUESTION PRESENTED

This appeal presents the single issue of the constitutionality of Ky. Rev. Stat. 454.030 which allows constructive service of process by posting forcible entry and detainer actions.

PARTIES TO THE PROCEEDING

LINNIE LINDSEY and BARBARA HODGENS and PAMELA RAY, on behalf of themselves and all other persons similarly situated;

LOUISVILLE WELFARE COUNSELING STOREFRONT, INC., a non-profit corporation, on behalf of all its members; and

RUTH ARMSTRONG, individually and on behalf of public housing tenants, and on behalf of all others similarly situated, and as acting president of the LOUISVILLE WELFARE COUNSELING STOREFRONT, INC., and

THE LOUISVILLE WELFARE RIGHTS ORGANIZATION:

TENANTS UNION, INC., a non-profit Kentucky corporation, on behalf of all its members, by and through its Coordinator, CARL THOMAS - *Appellees*

v.

THE HOUSING AUTHORITY OF LOUISVILLE;

DONALD L. HARRIS, Executive Director of The Housing Authority of Louisville;

D. W. BEARD, Administrator of Community Development of the Housing Authority of Louisville; and

HARRY W. TODD, Development Manager of Parkway Place Project of the Housing Authority of Louisville; and

LAWRENCE THOMAS, Development Manager of Clarksdale Project of the Housing Authority of Louisville;

S. CARTER BACON, Deputy Sheriff; JOSEPH GREENE, Sheriff, and UNKNOWN DEPUTY SHERIFFS - - - - - - - - *Appellants*

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-341

JOSEPH GREEN and
UNKNOWN DEPUTY SHERIFFS - - *Appellants*

v.

LINNIE LINDSEY,
BARBARA HODGES, and
PAMELA RAY - - - - - - *Appellees*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF APPELLANTS

CITATIONS TO THE OPINION AND JUDGMENT DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, the Court below is cited as:

Lindsey v. *Green,* 649 F. 2d 425 (1981).

The opinion was entered on May 18, 1981, and is set forth in full at page 3 of the Joint Appendix.

The Judgment of the District Court, which was reversed by the Sixth Circuit, was entered on May 18, 1979. It is set forth in full at page 37 of the Joint Appendix. There is no other citation to the judgment.

GROUNDS OF JURISDICTION

This is a direct appeal from the decision of the United States Court of Appeals for the Sixth Circuit, which held Ky. Rev. Stat. §454.030 to be violative of the Due Process Clause of the United States Constitution. Jurisdiction of this Court is founded on 28 U.S.C. §1254(2). The Sixth Circuit rendered its opinion on May 18, 1981. Notice of appeal to the Supreme Court of the United States was filed with the Sixth Circuit on July 6, 1981 (J.A. 1). The Court noted probable jurisdiction on October 19, 1981.

CONSTITUTIONAL PROVISIONS

Constitution of the United States of America:

14th Amendment, Section 1: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE KENTUCKY STATUTE IN QUESTION

454.030. *Forcible entry or detainer, how notice served.*

If the officer directed to serve notice on the defendant in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any member of the de-

fendant's family thereon over sixteen years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court.

STATEMENT OF THE CASE

This case involves the use of constructive service of process pursuant to Ky. Rev. Stat. §454.030 to notify tenants of a Louisville public housing project that a Writ of Forcible Entry and Detainer had been filed against them in state court.

The officer of the court who is charged with serving notice in a forcible entry and detainer action, usually a Jefferson County Deputy Sheriff, takes the following steps in notifying a tenant. First, the officer goes to the apartment in an effort to effectuate personal in-hand service. Second, if the named tenant is absent or will not appear at the door, personal in-hand service is made on any member of the tenant's family over sixteen years of age. Finally, if no one answers the door, a copy of the notice is posted on the premises, usually the door (J.A. 77, 79, 81).

After notice had been affected on Appellees Lindsey, Hodges and Ray by posting, a Default Judgment on a forcible entry and detainer was obtained against them. Thereafter, the Appellees filed suit in the Federal District Court for the Western District of Kentucky, alleging the posting was violative of the Due Process Clause (J.A. 83). The Appellees then made a Motion for Summary Judgment on the issue (J.A.

54). Appellants responded with a Motion for Summary Judgment (J.A. 45). The District Court affirmed Appellants' Motion for Summary Judgment in a Memorandum Opinion (J. A. 37). The District Court's Opinion held that Ky. Rev. Stat. §454.030 did not violate the notice requirement of the Due Process Clause by the use of posting. Thereafter, Appellees appealed the District Court Judgment to the United States Court of Appeals for the Sixth Circuit.

Upon Appeal, the Sixth Circuit reversed the District Court, holding Ky. Rev. Stat. §454.030 unconstitutional as violative of the notice requirement of the Due Process Clause. The Opinion of the Sixth Circuit is cited as 649 F. 2d 425. The Opinion is set forth in full at (J.A. 3).

SUMMARY OF THE ARGUMENT

The precise issue before this Court is whether Ky. Rev. Stat. §454.030 violated Appellees' procedural due process rights. The test this Court has formulated when considering questions of procedural due process can be stated very succinctly; is the notice reasonably calculated under the circumstances to apprise the affected parties notice of the pending action and an opportunity to be heard. This test does not now, nor ever has, required actual notice to the affected parties. The Appellants concede that in some cases, tenants may not receive actual notice, but nevertheless, the three-tiered requirements of Ky. Rev. Stat. §454.030; personal service on the tenant, personal service on a

member of the tenant's household over sixteen, and finally, as a last resort, posting, is more than adequate in complying with this Court's procedural due process test enunciated above.

ARGUMENT

The United States Court of Appeals for the Sixth Circuit ruled that Ky. Rev. Stat. §454.030 violated Appellees' procedural due process right. In doing so, they explicitly overruled *Weber* v. *Grande Lodge of Kentucky,* 169 F. 522 (6th Cir.), cert. denied, 215 U. S. 606 (1909).

The Sixth Circuit overruled *Weber* on the assertion that the doctrinal framework underlying that decision had been overruled by the Supreme Court in *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306 (1950); and *Shaffer* v. *Heitner,* 433 U. S. 186 (1977) (J.A. 7). The *Weber, supra,* decision was a forcible entry and detainer action over possession of a building in Louisville leased by out-of-state residents. Notice of the action was by posting, just as in the present case. The foundation of the *Weber* decision was based on the Supreme Court's ruling in *Pennoyer* v. *Neff,* 95 U. S. 714 (1877), which provided that *in rem* jurisdiction over a *res* required only the posting of notice of a judicial suit on the property. The theory was based on the concept that the seizure of property constitutes notice to the owner or possessor.

The Appellants believe the Sixth Circuit's reliance on *Shaffer* and *International Shoe, supra,* is misplaced. These cases deal with *quasi in rem* actions, that is, the property or tangible items itself, the *res* is not the object of the litigation, but was seized as a means of satisfying a possible judgment against the defendant whom *in personam* jurisdiction could not be obtained. The *Shaffer* Court formulated the now famous "minimum contracts" tests for obtaining *quasi in rem* jurisdiction over a defendant. The test requires that such minimum contacts exists that *in personam* jurisdiction over the defendant could be exercised under *International Shoe.* The practical effect of *Shaffer* was to eliminate pure *quasi in rem* proceedings to acquire jurisdiction for a possible judgment when *in personam* jurisdiction could not be obtained. There is no question that Kentucky has *in personam* jurisdiction over the Appellees in the present case, and the sole issue to be decided is whether Ky. Rev. Stat. §454.030 comports with doctrine enunciated in *Mullane, supra.*

In *Mullane,* the Supreme Court addressed the constitutional sufficiency of publication notice rather than mailed individual notice to known beneficiaries of a common trust fund as part of a judicial settlement.

The Court observed that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process. The Court then went on to formulate the test which will satisfy the requirements of due process: "Notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the ac-

tion and afford them an opportunity to present their objections" 339 U. S. at 314. The Court then went on to state:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. *The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected* [Emphasis added].
>
> 339 U. S. at 314, 315.

The Court then held that publication notice could not satisfy due process where the names and addresses of the beneficiaries were known. In such cases, the reasons disappear for resort to means less likely than the mails to apprise them of an action's pendency.

The *Mullane* case thus specifically held notice by publication when the names and addresses are known does not comport with the notice requirement of the Due Process Clause. Such is not the issue in the present appeal; notice has never been effected by publication in the newspapers and the Appellants must emphasize that "posting" is used as a method of service only as a last resort. The officer of the Court who serves summons in forcible entry and detainer actions first attempts to serve the defendant personally, and second, he attempts service by leaving the summons with a member of the defendant's family who is over sixteen years of age, and finally, he uses posting. Ap-

pellants believe the Kentucky statute falls within the guidelines set out in *Mullane;* that is, the statute is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.

In *Weber, supra,* the Court addressed the reasonableness of the method of notice and stated:

> The particular case we have before us, that of a tenant holding over after expiration of his term, seems to present no serious question as to the reasonableness of the manner of giving notice or the time for an appearance. There is nothing unreasonable in presuming that such a tenant would receive information by notice posted on the doors of the premises in dispute within the time he was required to appear.
>
> 169 F. at page 528.

In *Sullivan* v. *Choquette,* 420 F. 2d 674 (1st Cir., 1969), certiorari denied 90 S. Ct. 1691, 398 U. S. 904, 26 L. Ed. 2d 62, rehearing denied, 90 S. Ct. 2237, 399 U. S. 938, 26 L. Ed. 2d 809, the Court stated:

> In actions concerning rights in property, within the state, due process requires only that reasonable notice and an opportunity to be heard be afforded. *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); F. James, Civil Procedure §§12.1, 12.7, 12.11 (1965) Restatement of Judgments §32, comments a, f, and g (1942); see Wagner v. Wagner, 110 U. S. App. D. C. 345, 293 F. 2d 533 (1961); *Schulte* v. *Walker,* 130 F. 2d 907 (7th Cir. 1942).
>
> 420 F. 2d at page 676.

In *Velazquez* v. *Thompson,* 451 F. 2d 202 (2d Cir. 1971), the plaintiffs, who were all New York City apartment dwellers who were evicted from their apartments because of nonpayment of rent, challenged the statutory scheme for summary eviction. The New York statute is quite similar to the statute herein and the Court found that it "clearly complie[d] with due process requirements." 491 F. 2d at page 204.

The *Velazquez* case, *supra,* was cited with approval by the District of Columbia Court of Appeals in *Westmoreland* v. *Weaver Brothers, Inc.,* 293 A. 2d 506 (1972), wherein the Court stated:

> *We also disagree with appellants' contention that service by posting violated constitutional due process requirements.* The adequacy of notice for due process purposes depends on whether it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank and Trust Company,* 339 U. S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). In a landlord-tenant action for possession of premises "[i]t is to be noted initially that since this is an action to recover the possession of premises occupied by a person who is resisting removal, his whereabouts are obviously fixed and easily determinable. Thus the usual problem of serving a person whose present residence is unknown, which gives rise to much of the constitutional litigation . . . is absent." *Velazquez* v. *Thompson,* 451 F. 2d 202, 205 (2d Cir. 1971). In such a suit, we cannot say that service by posting is not reason-

> ably calculated to give the tenant notice of the pending action and therefore there is not constitutional infirmity [Emphasis added].
> 295 A. 2d at pages 509-510.

The Sixth Circuit's decision holding Ky. Rev. Stat. §454.030 unconstitutional placed great emphasis on the belief that some of the posted notices would be removed before the tenant returned home; thus making actual notice a requirement of *Mullane, supra.*

> . . . There was undoubtedly a time when posting provided a surer means of giving notice than did mailing. That time has passed. The uncontradicted testimony by process serves themselves that posted summonses are not infrequently removed by persons other than those served constitutes effective confirmation of the conclusion that notice by posting "is not reasonably calculated to reach those who could be informed by other means at hand." (J.A. 8).

The fact of actual notice is irrelevant to the question before the Court as the test under the Due Process Clause to the validity of notice is not whether the defendant actually receives notice, but rather whether the method used is one reasonably calculated to give notice.

It must be submitted to this Court that Ky. Rev. Stat. §454.030 affords landlords and tenants a fair and effective means of accomplishing a prompt adjudication of landlord-tenant disputes.

The circumstances and characteristics surrounding the landlord-tenant relationship and the need for forci-

ble entry and detainer was expressed in *Lindsey* v. *Normet,* 405 U. S. 36 (1972), as follows:

> There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property. Holding over by the tenant beyond the term of his agreement or holding without payment of rent has proved a virulent source of friction and dispute. We think Oregon was well within its constitutional powers in providing for rapid and peaceful settlement of these disputes.
>
> 405 U. S. at 72, 73.

Although *Lindsey* v. *Normet* did not deal with the issue of whether "posting" is sufficient notice, the Appellees' position is that the arguments put forth in favor of having landlord-tenant disputes settled rapidly and peacefully are applicable to having tenants served rapidly.

To deny landlords the use of the three-tiered process in Ky. Rev. Stat. §454.030 would allow an experienced process dodger to effectively prohibit a landlord from reaching a just and speedy adjudication with his tenants, thereby depriving him of his fundamental right to the rents and profits from his property. Surely this Court will not mandate that a property owner be deprived of the use of his property without due process of law.

CONCLUSION

The procedural due process test enunciated in *Mullane, supra,* is whether the manner of notice used is reasonably calculated to apprise interested parties of the pending litigation. Actual notice is not required. Service by certified or registered mail will not afford landlords a remedy in Court, as service by mail can be dodged more easily than personal service. Ky. Rev. Stat. §454.030 provides a three-tiered process with posting as a last resort. The Appellants believe the statute more than meets notice requirements of the Fourteenth Amendment and in so doing, effectively and justly balances the landlord's right to his property with a tenant's right to notice.

Ky. Rev. Stat. §454.030 should be held constitutional and the decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
JAN 4 1982
ALEXANDER L. STEVAS
CLERK

No. 81-341

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOSEPH GREENE and
UNKNOWN DEPUTY SHERIFFS - - Appellants

versus

LINNIE LINDSEY,
BARBARA HODGENS and
PAMELA RAY - - - - - - - Appellees

Appeal From the United States Court of Appeals
for the Sixth Circuit

BRIEF OF APPELLEES

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-341

JOSEPH GREENE and
UNKNOWN DEPUTY SHERIFFS - - *Appellants*

v.

LINNIE LINDSEY,
BARBARA HODGENS and
PAMELA RAY - - - - - - *Appellees*

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF APPELLEES

SUMMARY OF ARGUMENT

Appellee tenants (hereinafter "tenants") Linnie Lindsey, Pamela Ray and Barbara Hodgens resided in public housing in three apartments in Louisville, Kentucky. Their collective tenancies spanned fourteen years. Faced with the probability of forced eviction from their homes, they initiated this litigation based upon Appellants' failure to serve a Writ of Forceable Entry and Detainer under any of the modes of service allowed by KRS 454.030. By verified complaint they alleged, *inter alia,* that their failure to receive said Writ and its manner of supposed service, posting, violated due process. (J.A. 83-104).

Due to the public nature of their housing, tenants assert that their right to remain in said housing is a

property interest which is protected by the United States Constitution. *Rudder* v. *United States,* 226 F. 2d 51 (D.C. Cir. 1955); *Escalera* v. *New York City Housing Authority,* 425 F. 2d 853 (2d Cir. 1970); See *Thorpe* v. *Housing Authority of City of Durham,* 393 U. S. 268 (1969); 42 U.S.C. § 1441. Note, *Constitutional Law Procedural Due Process—Eviction From Public Housing,* 17 WAYNE LAW REVIEW 1007 (1968); Appellees' interest is one of great importance, an importance which is relegated to the scrap heap of inconsequence by the unreliable process of notification commonly known as "posting".[1]

Tenants argue the following: First, the nature of tenant-landlord matters is no longer solely *in rem.* Due to the changing dimensions of these proceedings, due process requires a manner of service more reasonably calculated to apprise the tenant. Second, because these matters are *in personam,* the Fourteenth Amendment mandates that posting in tenant-landlord matters, when used alone as the form of notice, is unconstitutional. Under KRS 454.030, no additional notice to tenants of the upcoming litigation is forthcoming, though it could result in their being forcibly removed from their home and/or in a judgment against them for rent allegedly owed.

Due process consists of two important elements, notice of the proceeding and an opportunity to be

---

[1]Posting is a process by which the process server places a Writ on the property by use of thumb tack, tape or other means. (J.A. 74).

heard at a meaningful time. Without ensuring that notice and its manner of service is reasonably calculated to apprise each individual of an upcoming proceeding, the opportunity to be heard is meaningless. Posting of a Writ has inevitable risks: it may be misdelivered, it may be pulled down by others, and it is at the mercy of the elements. Any one of these events would result in the Writ never reaching the tenant and never providing notice.

This Court has reviewed the manner in which notice to litigants is given, although never precisely in the tenant-landlord area. Where notice has been unreliable and not reasonably calculated under all circumstances to apprise the litigant of the upcoming judicial proceeding, this Court has disallowed such notice. This is exactly the problem with the posting of Writs: it is simply not reasonably calculated to apprise tenants of upcoming litigation.

Tenants believe that posting may be rendered constitutional if an additional manner of service is also used. Additional notice could and should at least take the form of a copy of the Writ mailed via first class or certified mail. Such an addition would satisfy due process. Tenants further assert that such a mailing, protected from being tampered with under the force of Federal law, would be economical, speedy, and most importantly, would create the likelihood that notice would be reasonably calculated to apprise the tenant of the upcoming proceeding.

ARGUMENT

A. The Nature of Tenant-Landlord Proceedings in the Commonwealth of Kentucky Mandates That Notice be Used Which Is Reasonably Calculated to Apprise Tenants of Eviction Proceedings.

KRS. 454.030 allows, under certain circumstances, the posting of a Writ of Forcible Entry and Detainer on a tenant's door. The Writ is the only court notice under the current statutory scheme that a tenant will receive to indicate that the landlord has initiated litigation.

Historically in Kentucky, as in other jurisdictions, possession was the only issue which was decided in the summary proceeding in the Commonwealth's district (formerly magistrate) courts. *Snyder* v. *Crutcher,* 290 Ky. 71, 160 S. W. 2d 156 (1941). It is the Writ of Forcible Entry and Detainer which initiates and serves notice of the proceeding. KRS. 454.030, KRS. 383.200, KRS. 383.210, KRS. 383.215.

However, a change has occurred due to legislation and evolving legal principles, particularly those relating to tenants' damage recovery. In two counties and one second-class city in Kentucky, a landlord may not only request possession, but may also seek a judgment for allegedly past-due rent by having a Writ of Forcible Entry and Detainer issued.[2] KRS. 383.715(2), see also KRS. 383.685. Within those same geographical areas, a tenant may defend possession and counterclaim for damages. See KRS. 383.645. The derivation of

[2]Those geographical areas are: Jefferson and Fayette Counties, as well as the second-class city of Covington.

this change is the adoption by the Kentucky Legislature of the Uniform Residential Landlord-Tenant Act (hereinafter "URLTA"), KRS. 383.505, *et seq.*[3] In addition to its current application, the law is available in the future to any city within the Commonwealth which attains sufficient population to become a city of the first class, or to any county which forms an urban-county government. See KRS. 383.715(2), KRS. 67A.010, *et seq.*

In all areas of the Commonwealth, a tenant-landlord proceeding is one in which a jury may be had. KRS. 383.210(2).

For those URLTA counties, as well as those counties not currently covered by URLTA, a tenant in Kentucky, as in most sister jurisdictions, has alternative measures of relief.[4] A tenant has both a defense to

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[3]Other jurisdictions which have adopted URLTA and have by legislation adopted an express warranty of habitability are:

Alaska	Delaware	Kansas	New Mexico
Arizona	Florida	Montana	Ohio
California	Hawaii	Michigan	Tennessee
Connecticut	Iowa	Nebraska	Virginia
Washington			

[4]Jurisdictions which have recognized, via judicial decision, the implied warranty of habitability are: *Pines* v. *Perssion*, Wis., 111 N. W. 2d 409 (1971); *Javins* v. *First National Realty*, 428 F. 2d 1071 (D.C. Cir. 1970) cert. den. 400 U. S. 195 (1970); *Lemle* v. *Breeden*, Haw., 462 P. 2d 470 (1969); *Marini* v. *Ireland*, N. J., 265 A. 2d 526 (1970); *Kline* v. *Burns*, N. H., 276 A. 2d 248 (1971); *Morbeth Realty* v. *Rosenshine*, 323 N.Y.S. 2d 363 (1971); *Jack Spring* v. *Little*, Ill., 280 N. E. 2d 208 (1972); *Gillette* v. *Anderson*, Ill., 282 N. E. 2d 149 (1972); *Mease* v. *Fox*, Iowa, 200 N. W. 2d 791 (1972); *Boston Housing Authority* v. *Hemingway*, Mass.,

(Footnote continued on following page)

possession and a counterclaim based upon the implied warranty of habitability and upon the Consumer Protection Act.[5] See KRS. 367.110, *et seq.*

The principle of warranty of habitability, be it implied or express, has resulted in a leasehold being treated as a contract with mutually dependent covenants. That is, the tenant's responsibility to pay rent is dependent upon the landlord's providing habitable premises. *Javins* v. *First National Realty,* 428 F. 2d 1071, 1075-1077 (D.C. Cir. 1970). However rooted in our legal heritage it may be, courts may no longer cling to the traditional belief that possession (*in rem*) is the only issue to be decided in an action for eviction. See Grimes, *Caveat Lessee,* 2 VALPARAISO UNI-

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(Footnote continued from preceding page)

293 N. E. 2d 831 (1973); *Steele* v. *Latimer*, Kan., 521 P. 2d 304 (1974); *Green* v. *Superior Court,* Cal., 517 P. 2d 1168 (1974); *Park West Management* v. *Mitchell,* N.Y. Ct. App., 391 N. E. 2d 1288 (1974); *Old Towne Development Co.* v. *Langford,* Ct. App., Ind., 349 N. E. 2d 744 (1976); *Duke* v. *Clark,* Iowa, 267 N. W. 2d 63 (1978); *Kamarath* v. *Bennett,* Tex., 568 S. W. 2d 658 (1978); *Pugh* v. *Holmes,* Pa., 405 A. 2d 897 (1979); *Teller* v. *McCoy,* W. Vir., 253 S. W. 2d 114 (1978). See also *Pernell* v. *Southall Realty,* 416 U. S. 363, at 364 footnote 1 (1974).

[5]Although Kentucky has no reported decisions, analogous authorities in other jurisdictions are: *Love* v. *Presley,* 239 S. E. 2d 574 (1978); *York* v. *Sullivan,* 338 N. E. 2d 341 (1975); see also, Backman, *Tenant As A Consumer, A Comparison of Developments in Consumer Law and in Landlord/Tenant Law,* 33 OKLAHOMA LAW REVIEW 1 (1980); Deschenes, *Consumer Protection Legislation and the Assertion of Tenant Rights: Massachusetts Paradigm,* 59 BOSTON UNIVERSITY LAW REVIEW 483 (1979); *Application of State Consumer Protection Acts to Landlord-Tenant Practices,* Richard Blumberg, 15 CLEARINGHOUSE REVIEW 399 (October 1981).

VERSITY LAW REVIEW 189 (Spring 1968); Quinn & Phillips, *Law of Landlord-Tenant: Critical Evaluation of the Past With Guidelines for the Future,* 38 FORDHAM LAW REVIEW 225 (1969).

Since a tenant-landlord proceeding is no longer solely *in rem* in the Commonwealth of Kentucky, any *in personam* applications of due process clearly apply to these proceedings. As will be expanded upon below, due process, as it applies to posting in tenant-landlord matters, requires better substituted service than the mere posting of the Writ upon a door. *Lindsey* v. *Greene,* 649 F. 2d 425 (6th Cir. 1981); *Velazquez* v. *Thompson,* 451 F. 2d 202 (2d Cir. 1971).

B. Due Process Requires Notice That Is Reasonably Calculated, Under All the Circumstances, to Apprise Tenants of Upcoming Proceedings.

Due process is a concept which embodies fundamental fairness. It cannot be precisely defined and defies any mechanical application of the Fourteenth Amendment. *Lassiter* v. *Department of Social Services of Durham County, North Carolina,* —— U. S. ——, 101 S. Ct. 2153 (1980). It is a concept which is flexibly amenable to the needs of an ever-changing society. The Fourteenth Amendment provides that in order to conform to due process one is entitled to notice so that one may be heard. *Parratt* v. *Taylor,* —— U. S. ——, 101 S. Ct. 1908 (1981); *Boddie* v. *Connecticut,* 401 U. S. 371 (1971); *Fuentes* v. *Shevin,* 407 U. S. 67 (1972). It is tenants' position that given the nature

of due process, posting alone does not conform to this constitutional principle in eviction actions.

HISTORICAL REVIEW AND ANALYSIS OF DUE PROCESS.

(1) United States Supreme Court.

It is submitted that it would be of service to this Court and would better illustrate tenants' argument relating to the changing concept of due process if an historical review of notice and the Fourteenth Amendment were undertaken. This discussion must necessarily be intertwined with this Court's treatment of *in rem* and *in personam* jurisdiction.

This Court originally articulated two standards for measuring constitutional sufficiency of notice; one for proceedings *in personam* and another for proceedings *in rem*:

> [N]otice of the controversy is necessary in order to become a party, and it is a principle of natural justice . . . that before the rights of an individual be bound by a judicial sentence, he shall have notice, *either actual or implied,* of the proceeding against him. *Where these proceedings are against the person, notice is served personally, or by publication; where they are in rem, notice is served upon the thing itself.* (Emphasis added.) *The Mary,* 9 Cranch 126, 144 (1815).

By the late nineteenth century it was held that a state court's power to notify defendants of actions against them was co-extensive with its power to enter-

tain those actions. *Pennoyer* v. *Neff,* 95 U. S. 714 (1877). Because individuals were only "within" a state's territory if they were physically present, service to the defendant, i.e., official notice of an action, became the measure of obtaining jurisdiction. Where defendants were outside a court's territorial reach, the court was powerless to send notice of actions pending against them.

Even though states could not extend judicial presence beyond their boundaries, they retained power to adjudicate rights to all property within their boundaries, regardless of the owner's domicile. Their ability to notify out-of-state owners of those proceedings was, by implication, limited by their territorial reach. The *Pennoyer* court, in reconciling the state's need to retain jurisdiction and defendant's need for notice, adopted the fiction that seizure of property is sufficient to notify out of state owners of actions against their property. When combined with the fact that process could not be extended into another state, this doctrine prohibited the state from providing notice more suitable than that arising from seizure of property.

In a series of cases decided subsequent to *Pennoyer,* this Court more clearly articulated the limit on a state court's power to send notice outside its territory. See, e.g., *Arndt* v. *Griggs,* 134 U. S. 316 (1890); *Ballard* v. *Hunter,* 204 U. S. 241 (1907).

This application of Fourteenth Amendment Due Process and the discussion relating to notice and jurisdiction were altered by this Court's decision in *Inter-*

national Shoe Co. v. *Washington*, 326 U. S. 310 (1945). In *International Shoe*, this Court extended jurisdiction to an out-of-state corporation, assuming sufficient in-state contacts existed.

The most recent major cases involving due process and substituted service of notice are *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 309 (1950), and *Shaffer* v. *Heitner*, 433 U. S. 186 (1977).

In *Mullane*, the Court balanced the state's interest in adjudicating rights in trusts against the beneficiaries' right to notice of such proceeding. 339 U. S. at 313-314. While the state interest in closing trusts was clearly sufficient to support jurisdiction over all claimants to the trust, rightful assumption of jurisdiction did not imply adequate notice. *Id.* at 313-314. Notice by publication was sufficient for beneficiaries whose names and addresses were unknown. However, where names and addresses were known, the justifications for using means of notification less reliable than mail disappeared. *Id.* at 318. Regarding the use of the mails, the Court stated:

> . . . The mails today are recognized as an efficient and inexpensive means of communication. at 319.

Shaffer involved a shareholder's derivative suit and Delaware's assertion of jurisdiction over defendants based solely on their property being situated in Delaware. The Court determined that the method of notice provided for under Delaware statute, which allowed jurisdiction by the sequestration of stock, was violative

of due process. This Court found that seizure of the property (stock) did not constitute notice:

> The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without modern justification. Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally unfair to defendant. at 212.

Justice Stevens' concurrence, relying upon the following poignant quote from *McDonald* v. *Mabee*, 243 U. S. 90, 92 (1917) reminds one of the dangers of substituted service:

> To dispense with personal service the substitute that is *most likely to reach the defendant* is the *least* that ought to be required if substantial justice is to be done. (Emphasis provided.) at 218.

Justice Stevens also noted that:

> Throughout our history the acceptable exercise of *in rem* and quasi *in rem* jurisdiction has incurred a procedure giving reasonable assurance that *actual notice* of the particular claim will be conveyed to the defendant. Thus, publication, notice by registered mail . . . has been an essential ingredient of any procedure that serves as a substitute for personal service within the jurisdiction. (Emphasis provided.) at 218.

(2) Sixth Circuit.

Additional review must now occur concerning the Sixth Circuit's discussion of notice, due process and its application to tenant-landlord matters.

The Sixth Circuit in *Lindsey* v. *Greene,* 649 F. 2d 426 (6th Cir. 1981), was clearly correct in rejecting the outmoded ruling of *Weber* v. *Grand Lodge,* 169 F. 522 (6th Cir. 1909). An analysis of *Weber* indicates that the Circuit Court believed, relying upon *Arndt* v. *Griggs, supra,* that if non-resident defendants in forcible entry and detainer actions could not be served by posting, they could not be evicted from land within the state. *Id.* at 526, 527-528. The *Weber* court also believed the matter involving tenants was solely *in rem. Id.* at 527. At that time, posting was compared to notice by publication, which was deemed acceptable. *Id.* at 527. Moreover, *Weber* rests upon cases decided prior to, and overruled by, the clear implication of *International Shoe.* See *Lindsey* at 426-428.

The Sixth Circuit recognized in *Lindsey* that this Court had, for the purposes of due process, greatly diminished any limiting distinction that had existed between the type of process in matters *in rem* and matters *in personam.* Thus, the Sixth Circuit decided that such substituted service was no longer reasonably calculated to advise the tenant of the pending proceeding. The Court also examined the decline of publication as an acceptable form of service where the name and address of the litigant are known.

In *Weber,* the Circuit Court compared posting to publication and deemed posting acceptable since publication was acceptable as due process. In contrast, over seventy years later, the same Circuit Court again reviewed substituted service. Since publication alone

is no longer in conformity with due process, neither is posting. *Lindsey* at 427, 428.

C. Due Process Places Substantive Restrictions on Posting as a Method of Notice.

In light of the foregoing historical overview concerning this Court's regard for notice and due process, and in light of the legal reasoning and application of these principles in the Sixth Circuit, posting will be evaluated.

Reasonableness of notice is determined by balancing the state's interest in final adjudication of rights to property within its jurisdiction against the individual's interest in notice of the proceedings. *Mullane, supra,* at 313-314. Any lack of notice which would defeat the state's interest in a final adjudication is not justified. *Id.* at 313-314. When personal service is not possible, the minimally acceptable alternative is that which is most reasonably calculated to advise the litigant of the proceeding. *Schroeder* v. *City of New York,* 371 U. S. 208 (1962). *City of New York* v. *New York, New Haven and Hartford Railroad Co.,* 344 U. S. 293 (1953); *Mullane, supra; Walker* v. *City of Hutchinson,* 352 U. S. 112 (1956). Neither seizure of property nor publication is now sufficient to inform persons of actions pending against them. No proceeding will lie against a person who can be readily located unless that person is notified at a minimum by first class mail.

D. Posting Is Not Reasonably Calculated, Under All the Circumstances, to Alert Tenants of the Pendency of Eviction Actions.

The present adequacy of notice by posting must be evaluated in light of the realities of contemporary society, rather than by conditions which existed at the turn of the century when *Weber* was decided. This Court has long recognized the need to account for changing societal norms in its application of constitutional guarantees to different factual situations:

> [W]hile the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387 (1926).

The bucolic rural life confronting the *Weber* court has risen to the complexity and congestion of present urban environments. While service by posting may have been reasonably calculated to reach tenants at the turn of the century (a dubious proposition for non-resident owners), the same is not true today. In fact, the assumption becomes the more ludicrous in the face of run-down tenements and slum housing. Such environments can hardly nurture the tenuous life of a posted writ.

Service by posting creates a substantial risk that the defendant will not receive notice of the action against him or her. Appellants' brief concedes that there are times when tenants do not receive the Writ

(Appellants' Brief 4). Posting cannot guarantee against the possibilities that the Writ will be blown away, mis-delivered, ripped down by vandals, or otherwise taken from the attention of the tenant who is being threatened with imminent eviction. (J.A. 73, 74, 77, 78, 80, 82). The concession of the occurrence of these plausible mishaps indicates the lack of *reasonable* calculation of posting to be received under *all* the circumstances.

While Appellants argue that posting is a procedure of last resort (Brief 7), in fact, this most unreliable of methods, in practice, is often of most common resort. (J.A. 76).

In the arguments in favor of posting, Appellants cite *Sullivan* v. *Choquette,* 420 F. 2d 674 (1st Cir. 1969), and *Westmoreland* v. *Weaver Brothers, Inc.,* 295 A. 2d 506 (1972). While neither of these cases overturned posting as unconstitutional, there are interesting distinctions that reduce whatever precedential value is attributable to them.

In *Sullivan,* the tenant had actual notice of the proceeding, something which the Court found to be of overwhelming significance. 420 F. 2d at 676. Also, if Appellants had completed the quote on page 9 of their own brief, it would be readily determined that there are commentaries criticizing posting as a method of service. *Id.* at 676.

In *Westmoreland,* the Court actually overturned a lower court's judgment and gave the tenant a new trial based upon her allegation that she did not receive the

Writ which, according to the process server, had been posted. *Id.* at 508.

Notice is of utmost importance herein. Without ensuring that the first element of due process, notice of the proceeding, is mandatory, the second portion, opportunity to be heard, will evaporate and become meaningless. Outside of an individual's family and liberty, there is no one more important element to an individual than his/her home. The home, be it rented or owned, has been described ". . . as not merely a sleeping room but the place where one eats, bathes, reads, visits, throws off the cares of business and surrenders to desires for creature comforts and human associations." *In Re Morgan's Estate,* 228 N.Y.S. 2d 36, at 38 (1962). It is that domain to which the Writ of Detainer is directed.

E. Mailing, as an Additional Requirement Where Posting Is Used, Is a Quick and Efficient Means of Increasing and Enhancing the Likelihood That the Writ Will be Reasonably Calculated to Notice the Tenant of Pending Proceedings.

Application of the foregoing balancing test to the case at bar discloses no reason why notice by first class or certified mail should not be required. Contrary to the spectre raised by the Appellants that mailing would increase the time needed to adjudicate these matters (Appellants' brief 11-12), the additional requirement of mailing a Writ to the defendant would not place an undue fiscal or administrative burden on the landlord or the courts. The postage cost would be *de minimus.*

The administrative burden (speed) would be no more than the time required to address an envelope to the defendant. In fact, the process servers in Kentucky are currently providing additional service by mail with no significant difficulty.

Appellants' emphasis on speed of process rather than due process should be viewed with a questioning eye. Certainly the purpose of due process is not speed but fundamental fairness. As stated in *Stanley* v. *Illinois,* 405 U. S. 645 (1972):

> The Constitution recognizes higher values than speed and efficiency; the Bill of Rights in general, the Due Process Clause in particular, were designed to protect the fragile values of vulnerable citizenry from the overbearing concern for efficiency. . . . at 656.

Additionally, the mails have the protection of federal statutes regarding their delivery and safety. See 18 U.S.C. §1708. Cf. 18 U.S.C. §1702.

Due to Appellants' incorrect characterization that the New York statute in *Velazquez* v. *Thompson,* 451 F. 2d 202 (2nd Cir. 1971), and the Kentucky statute are "quite similar," it may not be so readily apparent that in the controlling section, the posting one, they are quite different. The New York statute, when substituted service via posting is used, requires that an additional copy of the notice concerning the pending proceeding be mailed. *Id.* at 205. During the litigation, the New York Legislature chose to strengthen the mailing portion of the statute to require registered or

certified mail. *Id.* at 206. It is this additional requirement that allows the New York statute to survive scrutiny under the Fourteenth Amendment. It is truly unfortunate, in fact constitutionally fatal, for Kentucky to have ignored this additional requirement.

Appellants also characterize tenants as "experienced process dodgers" who would thwart any improvement in the posting system (Appellants' brief 12). This may be dealt with in either of two ways. First, the Court may require that the Writ be sent via ordinary first class mail, thus not requiring the certified slip to be signed, or secondly, the Court should simply take a position that those who refuse to accept the certified letter be deemed served. In either event, in this record there is no evidence of process-dodging, which is a far cry from tenants who, through no fault of their own, never receive notice of judicial proceedings to evict them.

The mails are a reasonably reliable and speedy mode of delivery and notice in today's society. This Court has recognized such. Supreme Court Rule 28.2, 28.3; F.R. Civ. P. 6(e).

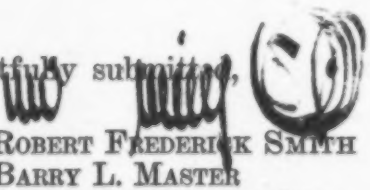
The concept of fundamental fairness embodied in the Fourteenth Amendment requires that the likelihood of receipt of notice be increased as much as possible whenever substituted service is employed. Further, when one considers the tragic loss and deterioration of due process that will result from a failure to ensure that notice is provided, there is little doubt that a mailing requirement is mandated by the Fourteenth Amendment.

CONCLUSION

As old as *Pennoyer* and twice as unconstitutional is an appropriate description of posting.

Because of the dangers involved with its use, dangers which thwart its usefulness as a manner of service reasonably calculated to provide notice, and because of the importance of the matters involved, the Fourteenth Amendment requires that the use of posting, as provided by KRS. 454.030, be stricken as unconstitutional.

Respectfully submitted,



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MOTION FILED
DEC 30 1981

No. 81-341

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JOSEPH GREENE and UNKNOWN DEPUTY SHERIFFS,
Appellants
v.
LINNIE LINDSEY, BARBARA HODGENS and PAMELA RAY,
Appellees

Appeal from the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR ANTIOCH SCHOOL OF LAW; AYUDA, INC.; COLUMBUS COMMUNITY LEGAL CLINIC OF THE CATHOLIC UNIVERSITY LAW SCHOOL; D.C. HOUSING RIGHTS PROJECT; D.C. LAW STUDENTS IN COURT PROGRAM; GEORGE WASHINGTON UNIVERSITY LEGAL AID BUREAU; THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA; LEGAL COUNSEL FOR THE ELDERLY; NEIGHBORHOOD LEGAL SERVICES PROGRAM OF THE DISTRICT OF COLUMBIA; AND UNIVERSITY LEGAL SERVICES

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The ten main providers of legal services to the indigent community in the District of Columbia hereby jointly move for leave to file a brief *amici curiae*, pursuant to Rule 36.3. The proposed *amici* are Antioch School of Law; Ayuda, Inc.; Columbus Community Legal Services of the Catholic University Law School; D.C. Housing Rights Project; D.C. Law Students In Court Program; George Washington University Legal Aid Bureau; The Legal Aid Society of the District of Columbia; Legal Counsel for the Elderly; Neighborhood Legal Services Program of the District of Columbia; and University Legal Services. We will refer to ourselves in this brief as the "D.C. *amici*." The appellees have consented to the filing of this brief while the appellants have refused their consent.

Each of the D.C. *amici* provides without charge or at low cost legal services to low income tenants. Our programs are separately governed and operated. Our programs operate approximately eighteen law offices in all the

lower income neighborhoods of the District of Columbia. We have nearly fifty attorneys among us, who spend significant amounts of time handling landlord-tenant cases. *Amici* Antioch Law School, Columbus Community Legal Clinic, George Washington University Legal Aid Bureau, and the Law Students in Court Program collectively involve approximately 100 law students who handle, *inter alia*, L&T cases during the school year. Antioch Law School, Legal Counsel for the Elderly, and the Neighborhood Legal Services Program each receives funding from the federal Legal Services Corporation. Each of the non-law school affiliated *amici* are D.C. non-profit corporations, with the exception of the D.C. Housing Rights Project, which is a partnership of two attorneys who receive a private grant to assist D.C. tenants.

Six of the D.C. *amici* have been serving the Washington community for over ten years. Ayuda, Inc. employs three Spanish-speaking attorneys to serve primarily the Hispanic community in Washington.

As stated more fully in Part B of our brief, the D.C. *amici* share a common sense that the practice of service by posting of summonses and complaints in forcible entry and detainer actions, also known as eviction actions, in our city has had disastrous consequences for our client community of over 100,000 persons. Thus we and our clients have a strong interest in apprising this Court of the ways in which the practice violates due process.

The D.C. statute permitting service of process in eviction actions, D.C. Code § 16-1502, closely resembles the Kentucky statute under consideration in this case. This Court's decision with respect to the Kentucky statute will directly affect our local courts' approaches to our District of Columbia statute.

Our brief offers relevant facts and questions of law not presented by either of the parties or by the *amicus curiae* National Housing Law Project. One of the cases

primarily relied upon by the appellants, *Westmoreland* v. *Weaver Bros., Inc.*, 295 A.2d 506 (D.C. 1972), was decided in our jurisdiction and we present material to refute the use of that decision by the appellants. Moreover, we present certain locally available facts on service by posting as actually practiced in a large city like Washington, D.C., which may not be presented by any party or the other *amicus curiae*. Such information will aid the Court in the disposition of this case.

We therefore respectfully request permission to file a brief *amici curiae*.

Respectfully submitted,

December 30, 1981

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---

BRIEF OF D.C. *AMICI CURIAE*

The D.C. *amici* file this brief to apprise the Court of the interests of themselves and their client community, the low income population of Washington, D.C., in the issue before the Court in this case.

INTEREST OF THE *AMICI CURIAE*

All of the D.C. *amici* are organized to provide legal representation to indigent persons, including appearances before the courts in the District of Columbia. A large number of clients are defendant-tenants in eviction actions which were commenced by service of process by posting. We show in this brief that this widespread practice of service of process by posting alone in eviction actions, the practice under review in this case, results in thousands of our clients and potential clients failing to be served with process and having default judgments entered against them. As a result our clients are seri-

ously hampered in their ability to present meritorious claims and defenses. Also, and much worse, the personal disasters that have befallen several of our clients as a result of evictions from their homes after no warning was received are truly horrifying. Such disasters have included not only the loss of all of the personal belongings of several families, but also the separation of children from their parents by "voluntary" placement in foster care because no adequate housing could be found soon enough to keep the family together after the eviction.

With respect to the D.C. *amici* ourselves, our already inadequate legal resources are often drained needlessly by preparing and arguing motions to set aside default judgments that would never have been entered against our tenant-clients, had they been properly served with process.

The Kentucky statute, whose constitutionality is under review in this case, is sufficiently similar to the parallel statute in the District of Columbia, that any holding by this Court with respect to the Kentucky statute will have a direct bearing on our law. Thus, both we, and the client community which we serve, have a direct interest in the outcome of this case.

SUMMARY OF ARGUMENT

In support of our contention that notice by posting alone in forcible entry and detainer actions violates tenants' rights to due process of law, the D.C. *amici* make two arguments. First, we show that *Westmoreland* v. *Weaver Brothers, Inc.*, 295 A.2d 506 (D.C. 1972), a D.C. case relied upon by the appellants for the proposition that notice by posting alone is constitutional, was wrongly decided. Second, we demonstrate that posting alone frequently does not afford tenants actual notice of the proceedings pending against them.

A. This Court's holding in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) directs plaintiffs

in all actions to choose a method of notice reasonably calculated to inform the defendant of pending proceedings. Under *Mullane*, if the preferred method of service is impossible for some reason, the plaintiff must employ not just any substitute, but the substitute which is both reasonable and likely to reach the defendant.

Under the D.C. statute providing for service of process in forcible entry and detainer actions, personal service is the preferred method, and substituted service on a responsible occupant of the premises is allowed if the defendant is not at home. Posting is the third and least preferred choice to be used, according to the plain language of the statute, only if the defendant "cannot be found." Yet, *Westmoreland* approved posting alone where the plaintiff clearly knows the defendant's whereabouts. It thus contravenes the very language of the statute it interprets.

In addition, *Westmoreland* ignores this Court's directive in *Mullane*, just stated above. Posting, as we show, is notoriously unreliable and frequently fails to provide tenants with actual notice. Posting supplemented by service by mail is a much more reliable method. At the least, *Mullane* requires that posting be supplemented by mail service. The *Westmoreland* court neither considered the likelihood that tenants would not receive notice by posting alone nor examined the reasonable and readily available alternative of supplementing posting with mailed notice. Thus, the *Westmoreland* decision is erroneous and should be given little weight by this Court.

B. As attorneys serving the low-income tenant population of the District of Columbia, and working with community organizations that also serve that population, the D.C. *amici* have for many years in many different ways observed the failure of posting alone to give actual notice to our clients. We represent to this Court that tenants often do not receive actual notice, even though, in many instances, they have good reasons to want to get the

summons. The conditions in which these tenants live, including poorly secured buildings which are subject to vandalism, prevent posting without more from being reliable. Moreover, the methods used by landlords who post demonstrate their lack of concern, again in contravention of *Mullane*, with whether defendants get actual notice. Since service by mail coupled with posting is a more reliable method of notice, and since it imposes only a minimal burden on plaintiffs, we urge this Court to affirm the decision of the Sixth Circuit Court of Appeals.

ARGUMENT

SERVICE OF PROCESS BY POSTING ALONE IN FORCIBLE ENTRY AND DETAINER ACTIONS DENIES DUE PROCESS OF LAW TO TENANTS WHOSE WHEREABOUTS ARE KNOWN TO THE PLAINTIFF, IN THAT IT IS NOT REASONABLY CALCULATED UNDER ALL CIRCUMSTANCES TO GIVE THEM NOTICE OF THE LAWSUIT PENDING AGAINST THEM.

A. Contrary to the Conclusion Drawn by the Appellants, District of Columbia Law Does Not Support the Conclusion That Service by Posting Alone Is Constitutional.

Like its Kentucky counterpart, the current District of Columbia statute governing service of process for forcible entry and detainer actions allows service by posting only upon the failure of the preferred methods of service, *i.e.*, personal, or substituted service:

> The summons provided for by section 16-1501 shall be served seven days, exclusive of Sundays and legal holidays, before the day fixed for the trial of the action. If the defendant has left the District of Columbia, or cannot be found, the summons may be served by delivering a copy thereof to the tenant, or by leaving a copy with some person above the age of sixteen years residing on or in possession of the premises sought to be recovered, and if no one is in actual

> possession of the premises, or residing thereon, by posting a copy of the summons on the premises where it may be conveniently read.

D.C. Code § 16-1502 (1981 ed.). With minor changes in language, the same statute has been in force in the District at least since 1888.

The statute's scant legislative history suggests that, in passing it, Congress was adopting this Court's solution to the same problem posed by *Pennoyer* v. *Neff*, 95 U.S. 714 (1878); that is, how to provide relief for plaintiffs whose defendants were absent from the jurisdiction, given the prevailing legal theory that a court's power to summon a defendant did not extend beyond the forum's borders. *See* the statement of Mr. Hemphill, 19 Cong. Rec. 1162 (1888), *quoted in Dewey* v. *Clark*, 86 U.S.App.D.C. 137, 139 n.2, 180 F.2d 766, 768 n.2 (1950). With the aid of such statutes the plaintiff-owner who could find neither a tenant, nor a responsible substitute with whom to leave process, need not remain forever unable to recover his premises. Instead, plaintiff could serve notice by simple posting.

From its inception in D.C., posting has clearly been the least favored method of serving process. Although Congress approved of posting, it did so only in limited circumstances. The language of the statute says that posting may occur only when the defendant is known to have left the jurisdiction or simply "cannot be found." D.C. Code § 16-1502 (1981 ed.). Further, the plaintiff must make efforts to effect personal or substituted service before concluding that the defendant "cannot be found." *Id.* Our Court of Appeals has held that the process server must conduct such efforts with due diligence before posting. *Dewey* v. *Clark*, 86 U.S.App.D.C. at 140, 180 F.2d at 769 (1950). *See also Etelson* v. *Andre*, 61 A.2d 806, 808 (D.C. Mun. App. 1948) (two attempts to make personal service may constitute due diligence).

Our legal system's lack of faith in posting as an effective method of service is emphasized by the fact that its use is confined to summary actions for possession. Our survey of D.C. law reveals that service by posting alone, without leave of court, is not permitted for any other form of action.

Indeed, our legislatures (Congress and the D.C. City Council) have not seen fit to extend service by posting to the several types of situations, such as actions for divorce, partition, and adverse possession, where parties-defendant have historically proven difficult to find. *See* D.C. Code § 13-336 (1981 ed.). Service by publication is permitted under several of these circumstances, but only where the plaintiff first proves to the satisfaction of the Court that the summons could not be served because the defendant: (1) cannot be found and (2) is a nonresident of the District of Columbia or has been absent from the District for at least six months. D.C. Code § 13-338 (1981 ed.). Moreover, the plaintiff must show the court that the published notice was mailed to the defendant's last known address or "that after diligent effort he has been unable to ascertain the last place of residence of the party." D.C. Code § 13-340 (1981 ed.). Even in eviction actions, a money judgment for unpaid rent may be entered only where the tenant has been served personally or has appeared personally to defend the action. Landlord and Tenant Rule 3 of the Rules of D.C. Superior Court. This distinction between actions for mere possession and actions for rent money judgment is, of course, derived from the distinction between *in rem* and *in personam* actions, and not from any currently recognized analysis of the most reasonable form of service. *See*, *Shaffer* v. *Heitner*, 433 U.S. 186 (1977). *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312-13 (1950) (adequacy of notice not measured by different standard depending on whether the action is *in personam* or *in rem*).

Mullane sets forth the current-day constitutional requirements for notifying defendants of actions pending against them. *Id.* at 314-5. Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the action and afford them an opportunity to present their objections." *Id.* at 314. *Mullane* goes on to state:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes. *Id.* at 315.

As we demonstrate graphically in Part B of our brief, posted summonses, as commonly used under conditions prevailing in a big city like the District of Columbia, may never reach the intended defendant at all. Posting is thus "substantially less likely" to notify the defendant than mailing plus posting. Given the greatly enhanced reliability offered by mail service, the extra burden on the plaintiff to address an envelope and affix a stamp is just as reasonable in the type of lawsuit considered here as it was in *Mullane*.

In fact, we doubt that a plaintiff-landlord would be permitted to serve notice of a forcible entry and detainer suit by posting alone even when he has completely lost track of the tenant's whereabouts, since he could still mail the summons to the apartment address on the chance that it might be forwarded to the tenant or picked up by a friend. Unlike situations where service by publication is permissible because a plaintiff has no knowledge

of the whereabouts of a party to be served, a landlord always has a last known address for the apartment whose possession he is seeking to regain.

Despite clear indications in *Mullane* that posting alone is never acceptable, our Court of Appeals concluded in one case that the practice was constitutional as applied to a defendant whose whereabouts were clearly known to the plaintiff. *Westmoreland* v. *Weaver Brothers, Inc.*, 295 A.2d 506, 510 (D.C. 1972). We contend that *Westmoreland*, relied upon by appellants in their brief, was wrongly decided and should be accorded little weight by this Court for the following reasons.

The decision in *Westmoreland* contradicts the plain language of the D.C. statute and the clear directive of *Mullane*. *Westmoreland* relied on *Velazquez v. Thompson*, 451 F.2d 202 (2d Cir. 1971), which upheld service by posting *and mail*—a distinction noted neither by the *Westmoreland* court nor by appellants in their brief—because the tenant's "whereabouts are obviously fixed and easily determinable." The *Westmoreland* court and the *Velazquez* court noted that "the usual problem of serving a person whose present residence is unknown, which gives rise to so much . . . constitutional litigation . . . is absent." *Velazquez*, 451 F.2d at 205, *quoted in Westmoreland*, 295 A.2d at 510. Yet posting is permitted by the D.C. statute on its face *only* when the whereabouts of the tenant's person are *not* fixed or easily determinable: "If the defendant has left the District of Columbia, or cannot be found . . . and if no one is in actual possession of the premises, or residing thereon . . .," then posting may be used. D.C. Code § 16-1502.

Mullane required mailing to the trust beneficiaries whose addresses were known to the trustee. Thus, *Westmoreland* was thoroughly wrong, according to both constitutional and statutory mandates, in permitting posting of a notice which did not reach the defendant, who de-

faulted, where plaintiff could easily have served the defendant by mail.

Indeed, *Barr* v. *Rhea Radin Real Estate, Inc.*, 251 A.2d 634 (D.C. 1969) shows clearly the problem with the *Westmoreland* court's poor analysis. The premises involved was a carriage house used solely for storage; the tenant lived elsewhere, apparently not in a dwelling connected to the carriage house. The managing agent knew the whereabouts of the tenant's home quite well and even discussed the conditions in the carriage house with the tenant *by telephone* "several times." A dispute arose over the management's failure to provide a lock for the carriage house door, the tenant withheld rent, and the landlord sued for possession. The U.S. Marshall served notice of the action by posting and the tenant defaulted since he never got notice. The tenant first learned of the action *by a telephone call* from an unspecified caller while the eviction was in progress.

The constitutionality of service by posting was not challenged in *Barr*, but the judgment was vacated on appeal on the grounds that the tenant "had no notice of the possessory action," had substantial defenses, and because of the court's "policy favoring trials on the merits." *Barr*, 251 A.2d at 635-36. We submit that in the *Barr* case, the form of service used was "substantially less likely to bring home notice than other feasible and customary substitutes," *Mullane*, 339 U.S. at 315, such as mail.

Why did the *Westmoreland* court make the mistake it did, and misconstrue the statutory intent to limit posting? Why did the *Westmoreland* court assume that posting could reasonably be expected to transmit a summons to a tenant, and conclude that posting clearly met the *Mullane* standard? Why did the *Barr* court vacate the judgment, but not even note the absurdity of posting a

notice which the tenant never saw, when the whereabouts of the tenant were readily known?

The answer to these questions lies in the fact that every local judge and attorney in the District of Columbia knows that service by posting is not used on the narrow, occasional, exceptional basis contemplated in the statute. Instead, as we next show, it is the method used in the overwhelming majority of forcible entry and detainer cases. These courts seemed to believe that posting is acceptable precisely because it has been so widely used for so long. Neither the *Westmoreland* nor the *Barr* court was shown nor did these courts examine the realities of service by posting in our large urban setting. Ten years ago our then highest local court addressed these realities, noting that "the overwhelming majority of summonses are served by posting." *Bell* v. *Tsintolas Realty Co.*, 139 U.S.App.D.C. 101, 104-05, n.7, 430 F.2d 474, 477, n.7 (1970). Relying on a study conducted by the Neighborhood Legal Services Program, one of the *amici* before this Court, the *Bell* court noted that of the 6,340 landlord and tenant summonses that had been served in September, 1969, 6,326 had been done by posting, 8 by substituted service, and only 6 by personal service upon the defendant. *Id.* A more recent random sampling conducted by Neighborhood Legal Services in 1977 indicates that the situation has not changed. Of 961 landlord and tenant cases sampled, 837 summonses were served by posting, 50 by substituted service, and 74 by personal service. Affidavit of Dan Duperrault submitted to the D.C. Court of Appeals in *Carroll* v. *Martin*, No. 12034 (D.C., February 28, 1978). As the court noted in *Bell*, "[t]hese figures raise the question whether a good faith effort is being made to serve tenants personally, as the statute requires." *Bell*, 139 U.S.App.D.C. at 104-05, n.7, 430 F.2d 478, n.7. We will show next that not only are tenants not served personally, they are frequently not served at all as a direct result of the practice of service by posting alone.

B. Experience in the District of Columbia Shows That Posting Alone Frequently Does Not Afford Tenants Notice of Proceedings Against Them.

The experience of the large, low income community from which our clients are drawn in the District of Columbia is that service by posting alone very often fails to transmit the eviction action summonses to the tenants. Over 100,000 actions for possession are filed in the Landlord/Tenant Branch of our Superior Court each year, according to statistics regularly published by that court's clerk's office. This figure is higher than that for any other category of actions handled in that court, including minor traffic infractions. Over 50,000 of the eviction actions each year result in a default judgment against the tenant. About eighty-five to ninety percent (85%-90%) of these actions are served by posting, according to the studies described above, p. 9. It should be noted that there are only approximately 180,000 rental units altogether in the District of Columbia, according to widely accepted data published by our local government.

We have not the resources to interview all the tenants who received these 50,000 default judgments in any one year to determine whether in fact they received actual notice of the actions against them. We do not even have the resources to track down and interview a statistically significant sample of these persons. Nor could we determine, with any measure of accuracy, from the landlord and tenant court records the reason why each case resulted in a default judgment. Such records do not ordinarily reveal the reason why the tenant defaulted.

Nevertheless, we are confident for a number of reasons that we are correct in stating that notice by posting alone is a pernicious evil producing numerous unwarranted default judgments and many surprise evictions annually. Our experiences with the practice of service by posting includes the following:

1. Collectively we operate about eighteen law offices serving the lowest income portions of the population of Washington in all parts of the city. We consult, and often work closely with, a variety of community service agencies across the city in serving this population. Because of the nature and scope of our activities, one of our staff is likely to be asked to assist in cases where our city's eviction procedures harm a tenant. The explanations by community workers and our staff arising from these daily encounters with this system for why service by posting fails to give notice exhibit a depressing consistency. Moreover, these stories echo the evidence produced in Kentucky in this case. Taping a piece of paper on an apartment door in most low-income buildings allows passing children, strangers, and even hostile neighbors to tear it off easily and throw it away. For example, a neighbor feuding with a tenant may see a court paper taped to the tenant's door and tear it down just to make trouble for that tenant. In addition, vandalism in the hallways and lack of security are widely recognized problems in our low-income buildings. Vandalism often means strangers coming into a building and tearing any posted notice down.

2. A recent major D.C. Bar study of the D.C. Landlord-Tenant Court system noted that "[a] serious practical limitation to service by posting is that notice which is taped or otherwise 'posted' to the front door of an apartment or other dwelling is easily susceptible to being dislodged before ever being seen by the tenant." D.C. Court System Study Committee of the District of Columbia Bar, *Landlord-Tenant Court Report*, p. 16 (May 18, 1981) (Committee Final Report).

To remedy this problem, the Committee recommends the posting statute be amended to require process servers who serve notice by posting to slip a copy of the notice under the tenant's door, and to require landlords to mail a copy of the posted summons to the tenant by regular mail. *Id.* at 17.

3. Evictions must be supervised by our U.S. Marshall's office. This office publishes daily a list of names and addresses of tenants against whom judgments have been entered and who are therefore scheduled for eviction. Some community workers make it their practice to obtain this list from the U.S. Marshall's office on a regular basis in order to contact the tenants listed. Two community organizations do this in two neghborhoods because they are funded by the city to assist tenants who are to be evicted by helping to find temporary shelter for them and their household goods. The workers who follow up on evictions listed for their neighborhood tell us that it is a not uncommon occurrence that the family scheduled for eviction is unaware of it until the Marshalls arrive.

4. In some cases, tenants are actively looking to receive the summons and complaint, only later to find out that default judgment was entered against them. For example, several community charities and churches will provide financial aid for rent only if the tenant brings in a summons and complaint to prove that s/he really is desperately in need of help. In other cases, tenants will have been advised by a community worker or even by one of our attorneys to withhold their rent in order to prod their landlord into providing heat or some much needed repair. The tenants in these case want to "take their landlord to court" to obtain help in having the landlord make repairs. However, since only the landlord can sue in our Landlord Tenant Branch of Superior Court, the tenant must wait for the summons and complaint to be served. If the tenant fails to receive the summons and complaint, his opportunity to vindicate his rights is lost or badly prejudiced.

5. The foregoing points illustrate that posting frequently fails to provide actual notice to forcible entry and detainer defendants. There is also evidence to illustrate that the plaintiffs—the landlords or their agents—are not in the least "desirous of actually informing" their tenants of the proceedings. *See Mullane*, 339 U.S. at

315. In early 1973, *The Washington Post* reported the results of an investigation it conducted into summons-serving procedures in Landlord-Tenant Court. *The Washington Post*, p.A1, col.2 (Jan. 29, 1973). The *Post* conducted a survey of court records in response to allegations made by Neighborhood Legal Services attorneys of widespread abuses by special process servers in forcible entry and detainer cases. Following the *Post's* report, the Chief Judge of the Superior Court appointed a committee comprised of three Superior Court judges to investigate the methods used by special process servers in these cases.

The Committee found that, during a two month period in 1972, 86% of all Landlord and Tenant summonses were served by posting, 9% by substituted service, and 5% by personal service. *Report of the Committee on Special Process Servers (Landlord-Tenant Cases)* (May 25, 1973). Further, the Committee found that 11 persons served 99.6% of all landlord and tenant summonses for the period studied. 86% of all summonses were served by 4 of those 11 persons. *Id.* Among the Committee's other findings were the following:

(1) in "a number of instances," special process servers indicated that they had served more than one person at precisely the same time. *Id.* at 6.

(2) In "numerous instances" special process servers swore that they had made service at two or more locations within an "impossible" or "improbable" time period. For example, one process server indicated on returns of service that he had been at the first location at 9:03 a.m., the second location—six miles from the first—at 9:05 a.m., and the third location—another six miles from the second—at 9:07 a.m. *Id.* at 7.

(3) In "many instances"—the one given in the preceding paragraph is an example—special process servers indicated that they had served "a number of summonses consecutively with identical time intervals between each service." *Id.* at 10.

(4) In "some cases" special process servers failed to indicate the time of service accurately by omitting to notice whether the summons was served in the morning or afternoon. *Id.*

(5) In "some cases" special process servers served "such an unusually large number of persons in a single day, that questions are raised about the validity of such service." *Id.*

Far from demonstrating a concern that tenants be notified of pending proceedings, these findings show that landlords and their agents do not comply with the requirements which the law imposes before posting is allowed. D.C. Code § 16-1502 (1981 ed). This appalling situation exists in direct contravention of the requirements, not only of our own statute, but of this Court's holding in *Mullane*. Moreover, to our knowledge, very few of the recommendations for reform issued by the 1973 study committee have ever been adopted.

6. In D.C. the summons and complaint are printed in English and contain numerous names other than the tenant's, such as the names of the landlord or his agents, several attorneys, and the court clerk. When a Spanish-speaking, or other non-English-speaking, tenant sees this form taped onto the wall or onto his door, he may or he may not realize that it is addressed to him and that he ought to tear it down and take it to someone who can translate it for him. On the other hand, if process arrived individually addressed to him in the mail, he is much more likely to take it to someone to have it translated and explained. In other words, the very act of posting an official-looking document like a summons and complaint can, to those persons who happen to be innocent to the ways of our legal system, be precisely a sign that the document ought to be left untouched, rather than taken down and acted on. Ayuda, Inc., the *amicus* on this brief who serves primarily the Hispanic community, reports having encountered cases of this kind on a number of occasions.

In summary, it is the experience of the D.C. *amici* that, in a large urban setting such as ours, where service by posting alone is allowed by statute, it is the method of choice to the virtual exclusion of other methods for process servers because of its relative cheapness. Moreover, when such wide use is made of this method under the circumstances described we have every reason to believe that it results in huge numbers of tenants not actually receiving process. With an equally inexpensive, simple alternative, namely, mail service coupled with posting, readily available, there is no room under the *Mullane* standard for further tolerance of the current use of service by posting alone.

CONCLUSION

Insofar as appellants have looked to District of Columbia case law to support their contentions, they cannot do so. Our years of experience in the District of Columbia with service of process by posting have been years of dismay at the widespread abuse of the due process standard. For all the reasons stated herein, we strongly urge this Court to affirm the Sixth Circuit's decision in this case.

Respectfully submitted,

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December 30, 1981

Amicus Brief

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MOTION FILED
DEC 31 1981

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 81-341

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versus

LINNIE LINDSEY, BARBARA HODGENS and PAMELA RAY, Appellees-Respondents.

Appeal from the United States Court of Appeals for the Sixth Circuit

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MOTION OF THE NATIONAL HOUSING LAW PROJECT FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES-RESPONDENTS

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MOTION OF THE NATIONAL HOUSING LAW PROJECT FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES-RESPONDENTS

Pursuant to Rule 42, the National Housing Law Project hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of counsel for the Appellees-Respondents has been obtained. The consent of counsel for Appellants-Petitioners was requested but refused.

The National Housing Law Project (Project hereinafter) has an interest in the case sub judice arising from its role as a national support and backup center to approximately 265 local Legal Sevices projects throughout the country. The Project is a California nonprofit corporation primarily funded by a contract with the Legal Services Corporation. The chief function of the Project is to serve as a resource for the more than 5,000 local Legal Services attorneys throughout the country. These

attorneys advise and represent approximately 1.5 million low-income clients annually, and about 20 percent of these cases involve housing issues. Appellees-Respondents in the instant case are represented by staff attorneys for the Legal Aid Society, Inc., of Louisville, Kentucky.

Project staff attorneys assist neighborhood Legal Services lawyers in helping their low-income clients in the subject matter areas of federally subsidized housing programs, private landlord-tenant relations, public housing, urban renewal, community economic development, low-income housing production and preservation and a myriad of other matters relating to housing, tenants' rights and urban affairs. In addition to providing assistance in individual cases, the Project is dedicated to attempting to further the development of the law in the

area of housing towards an increasing recognition of the rights and needs of low-income tenants in the United States.

The Project fully supports the arguments presented by Appellees-Respondents in their brief. However, because of the Project's special national expertise in the area of housing, it believes that it can add a dimension to the information presently before this Court. The Project's attached amicus brief provides a state-by-state survey of legislation and case law concerning service of process. It is hoped that an overview and summary of the collective wisdom of the legislatures and courts of the 50 states and the District of Columbia will aid this Court in its consideration of the issues presented in this case.

For the reasons stated above, the National Housing Law Project respectfully requests that this Court grant its

motion to participate as amicus curiae and accordingly file the attached amicus curiae brief.

Respectfully submitted,

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BRIEF FOR THE NATIONAL HOUSING LAW PROJECT AS AMICUS CURIAE IN SUPPORT OF APPELLEES-RESPONDENTS

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STATEMENT OF AMICUS CURIAE

Pursuant to Rule 42 and the Motion for Leave to File Brief Amicus Curiae in Support of Appellees-Respondents (tenants hereinafter), the National Housing Law Project (Project hereinafter) respectfully submits this brief as amicus curiae in support of tenants.

The interest of amicus is set out in detail in the Project's Motion filed with this Court and attached hereto.

SUMMARY OF ARGUMENT

The collective wisdom of the legislatures and courts of the 50 states and the District of Columbia concur by a two-to-one margin that posting without mailing is an unacceptable method for service of process. Thirty-four states either prohibit posting or allow it only when accompanied by mailing. Of the 17 states that do allow posting alone, two restrict its use rather severely, one cautions against its use without mailing, and one actually employs mailing even though it is not required.

Posting of process must meet the due process test set forth in Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) (hereinafter Mullane). That test does not require that the method of service of process merely be "reasonably calculated" to actually

notify a party, but rather be "reasonably certain" to actually notify a party and in any event "not substantially less likely to bring home notice than other of the feasible and customary substitutes." Mullane at 314-315.

It is clear that posting fails both prongs of the test while mailing (first class or registered or certified mail) easily satisfies either or both prongs of the test.

Lastly, any argument presented to this Court suggesting that speed or rapidity of the service of process procedure take precedence over stringent adherence to due process requirements must fail because "[s]ome delay, of course, is inherent in any fair-minded system of justice." Pernell v. Southall Realty, 416 U.S. 363, 385 (1974).

ARGUMENT

I. A NATIONAL SURVEY OF STATE LAWS CONCERNING POSTING WITHOUT MAILING AS A METHOD OF SERVICE OF PROCESS IN EVICTION ACTIONS DEMONSTRATES THAT POSTING IS DISFAVORED BY A MAJORITY OF STATES.

A. Fourteen states,[1] either expressly or by implication, prohibit posting of process as a means of effecting service of a complaint or summons in an eviction action. The majority of

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[1] Alaska -- 1962 ALAS. SESS. LAWS §09.45.120 and ALASKA RULE OF CIV. PROC. 4(c)(1);

Arizona -- ARIZ. REV. STAT. §12-1175 and ARIZ. RULE OF CIV. PROC. 4;

Arkansas -- ARK. STAT. ANN. §34-1500 et seq. (1981 Supp.) and ARK. RULE OF CIV. PROC. 4;

California -- CAL. CODE OF CIV. PROC. §§415.10-415.50 (1970);

Idaho -- IDAHO CODE §6-310 and IDAHO RULE OF CIV. PROC. 4;

these states have never recognized the practice and are therefore silent on the issue. A few of them have recently amended their service procedures to exclude posting.[2]

At least one state which currently prohibits posting, Texas, is considering adoption of a new rule (R. 742a) which would allow posting of process accompanied by mailing upon court order and only after "diligent efforts . . . on

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[n.1 cont'd]
Iowa -- IOWA CODE §648.5 (1981);
Montana -- MONT. CODE ANN. §70-27-101 and MONT. RULE OF CIV. PROC. 4;
North Dakota -- N.D. CENT. CODE, ch. 27-08-24 and N.D. RULE OF CIV. PROC. 4;
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South Dakota -- S.D. CODE §§15-6-4(d) and (e), and 21-16-6;
Texas -- TEX. RULE OF CIV. PROC. 742;
Vermont -- VT. STAT. ANN. §4853 and VT. RULE OF CIV. PROC. 4;
Washington -- WASH. REV. CODE §59.12.080 and WASH. SUP. CT. RULE 4;
Wyoming -- WYO. STAT. §1-21-1004 and WYO. RULES OF CIV. PROC. 4 and 5.

2 See, e.g., Arkansas, California, and Iowa, supra, at n.1.

multiple occasions" have failed to serve personally.[3] This proposed rule change responds to criticism that the personal-or-substituted-service-only rule made it very difficult for landlords to effect service of process. The proposed moderate rule appears to satisfy both landlord and tenant interests.[4]

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[3] The authors of the new rule provide the following history of its origin:

> A similar version of the above proposal was jointly recommended by the Texas Apartment Association and the Texas Tenants Rights Association, with informal approval by the Texas Justice of the Peace and Constable Association. The above proposal was recommended by the State Bar Committee on the Administration of Justice Committee by vote at its meeting on March 18, 1981.

Text accompanying Texas State Bar Committee on the Administration of Justice Committee (March 28, 1981).

[4] "The constitutionality of the rule was considered and discussed by the Administration of Justice Committee; and representatives of both the landlord and tenant associations assured the committee that from their research, the rule was not a violation of due process." Id.

B. Twenty states[5] allow posting as an alternate method of service of

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[5] Delaware -- DEL. CODE tit. 25, §5706 (1953);

Georgia -- GA. CODE §61-302(a) (1970) (mailing provision enacted in 1978);

Hawaii -- HAW. REV. STAT. §§634-23(3) and 634-24;

Illinois -- ILL. REV. STAT. ch. 57, §10.1;

Indiana -- IND. STAT. §32-7-3-3 and IND. RULES OF TRIAL PROC. 4.1(a)(3) and 4.1(b);

Maryland -- MD. REAL PROP. CODE ANN. §8-401(b);

Massachusetts -- MASS. RULES OF CIV. PROC. 4(d)(1); MASS. SUMMARY PROC. RULE 2(b); MASS. GEN LAWS ch. 223, §31; and Sullivan v. Choquette, 420 F.2d 674, 676 (1st Cir. 1969), primarily because "plaintiff in this case had actual notice";

Michigan -- DIST. CT. RULE 754.4(3) and DETROIT COMMON PLEAS RULES 46.5(a) and (b);

Minnesota -- MINN. STAT. §566.06;

Missouri -- MO. REV. STAT. §534.090(2);

Nevada -- NEV. REV. STAT. §§40.280(1)(b) and (c) (1967);

New Jersey -- N.J. STAT. ANN. §2A:18-54 and RULE OF COURT 6:2-3(b);

New York -- REAL PROP. ACTIONS & PROCEEDINGS LAW §735;

Ohio -- OHIO REV. CODE §1923.06 and OHIO RULES OF CIV. PROC. 1(c) and 4.1;

process to personal or substituted service,[6] but only when accompanied by mailing (first class, registered or certified) of the process to the defendant at his or her last known address (usually the subject premises).

Some states require multiple attempts at personal or substituted service before they will permit posting and mailing.[7]

[n.5 cont'd]
accord Cotterman v. Fahrig, 55 Ohio App.2d 15, 378 N.E.2d 742 (1972);
Oklahoma -- OKLA. STAT. 1148.5A (1976);
Oregon -- OR. REV. STAT. §105.135(2);
Tennessee -- TENN. CODE ANN. §§21-1-203, 21-1-205, and 29-18-115;
Utah -- UTAH CODE ANN. §78-36-6(4) (1953);
Virginia -- CODE OF VA. §8.01-296(2)(b);
Wisconsin -- WIS. STAT. ANN. §799.16(3)(a).

[6] In this context, "substituted service" refers to the practice of leaving papers with a competent person on the premises other than the party sought to be served.

[7] See, e.g., Wisconsin and Michigan, n.5 supra.

Other states require no more than a single attempt.[8] In this latter category, a process server may do no more than knock on a tenant's door, wait a moment, and then post the notice. The majority of "post and mail" states require posting in a conspicuous place;[9] at least one state has legislated a preference for the door;[10] and many states fail to specify a preference other than "upon the property"[11] or "onto some part of the premises where it may be conveniently read."[12]

Virtually all posting states agree that only personal service will suffice

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8 See, e.g., Indiana and Illinois, supra at n.5.

9 See, e.g., Maryland and Delaware, supra at n.5.

10 Georgia, supra at n.5.

11 Hawaii, supra at n.5.

12 Wisconsin, supra at n.5.

for the entry of a money judgment.[13] Posting alone (see subsection C, infra) or even combined with mailing will support only a judgment for possession of the premises. This dichotomy is a remnant of the antiquated distinction between in rem and in personam proceedings, but does serve as at least a minimal restriction on landlords who choose posting for service of process.

Possibly the most important observation that can be made about the "post and mail" statutes concerns the method of mailing required in conjunction with posting. Eight states[14] require

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[13] See, e.g., Missouri, supra at n.5; Oregon, supra at n.5, citing South State Investment Co. v. Brigum, 289 Or. 109, 611 P.2d 305 (1980); and New York, supra at n.5, citing Wayside Homes, Inc. v. Upton, 40 Misc.2d 1087, 244 N.Y.S.2d 624 (1963).

[14] Delaware, Hawaii, Missouri, New York, Ohio, Oklahoma, Oregon, and Tennessee.

registered or certified mailing, return receipt requested, while 12 states require only regular or first class mailing.[15]

Appellants argue in their conclusion that "[s]ervice by certified or registered mail will not afford landlords a remedy in Court, as service by mail can be dodged more easily than personal service."[16] This argument is specious because it presumes that tenants will intentionally avoid receipt of certified or registered letters, but, more importantly, it is misleading because it precludes consideration of mailing by regular or first class mail. The tenant cannot "dodge" normal mail delivery and

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15 Georgia, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, Utah, Wisconsin, and Virginia.

16 Appellants' Brief at 13.

the landlord's sworn affidavit will suffice as proof of mailing. The crucial element here is that first class mailing is both an inexpensive and a rapid means of assuring actual notice to a tenant whose home is in jeopardy. On balance, it is a triffling requirement.

C. Seventeen states[17] are in basic agreement with Kentucky and allow posting of process without the additional requirement of mailing. Many of these

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17 Alabama -- 1975 Ala. Acts §§6-6-332 and 35-9-82, upheld by Alabama Sup. Ct. in Krasner v. Gurley, 248 Ala. 686, 29 So.2d 224 (1947);

Colorado -- COLO. REV. STAT. §13-40-112 (1885, rev. 1963);

Connecticut -- CONN. GEN. STAT. §§47a-23 and 52--57 (1949);

Florida -- FLA. STAT. §48.183;

Kansas -- KAN. STAT. ANN. §61-1805, upheld in Threadgill v. Beard, 225 Kan. 298, 590 P.2d 1021 (1979), and §§60-307 and 61-1806;

Kentucky -- KY. REV. STAT. §454.030, held unconstitutional in Lindsey v. Greene, 649 F.2d 426 (6th Cir. 1981);

originated in the mid- to late 1800s and have not been amended since enactment.[18]

[n.17 cont'd]

Louisiana -- LA. CODE OF CIV. PROC. ANN. art. 4703 (West), upheld as constitutional in Ernest Joubert Company v. Tatum, 332 So.2d 553 (La. App. 4th Cir. 1976);

Maine -- ME. RULE OF CIV. PROC. 4(d)(1);

Mississippi -- MISS. CODE ANN. §89-7-33 (1972);

Nebraska -- NEB. REV. STAT. §25-508;

New Hampshire -- N.H. REV. STAT. ANN. §§510:2 and 540:13;

New Mexico -- N.M. STAT. ANN. ch. 21, art. 1 §1(4)(e) and N.M. RULE OF CIV. PROC. 4;

North Carolina -- N.C. GEN. STAT. §42-29;

Pennsylvania -- PA. STAT. ANN. tit. 68, §250.503 (Purdon); PA. RULE OF CIV. PROC. FOR JUSTICES OF THE PEACE 506; and RULE OF PHILADELPHIA MUN. CT. 107;

South Carolina -- S.C. CODE §§15-9-520 and 27-37-30;

West Virginia -- W.VA. CODE §56-2-1 and W.VA. RULE OF CIV. PROC. 4;

District of Columbia -- D.C. Code §16-1502 (1973), upheld in Dewey v. Clark, 180 F.2d 766, 86 U.S. App. D.C. 137 (1950).

18 See, e.g., Alabama (1852), Colorado (1885), Mississippi (1867), New Hampshire (1883), and North Carolina (1868), all cited supra at n.17.

A few of the "posting only" states require special safeguards before allowing a plaintiff to resort to posting. For example, Maine sanctions posting only upon court order on a motion "showing that service [personal or substituted] . . . cannot be made with due diligence."[19] South Carolina allows posting only when the subject premises "have remained unoccupied for a space of fifteen days or more immediately prior to the date of such service."[20]

Nebraska seems to treat posting purely as a symbolic method of providing notice to a potential defendant. In Walker v. Stevens,[21] the Nebraska Supreme Court held valid the posting of process at the home of a defendant who

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19 ME. RULE OF CIV. PROC. 4(d)(1).

20 S.C. CODE §27-37-30.

21 52 Neb. 653, 72 N.W. 1038 (1897).

was known to be imprisoned in another county at the time of posting. Obviously, reasonable attempts at actual notice are not crucial in Nebraska.

In North Carolina, posting in eviction cases is sanctioned by statute,[22] but the NORTH CAROLINA MANUAL FOR MAGISTRATES[23] warns judges that

> [t]he United States Supreme Court has said that due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Mullane v. Central Hanover Bank and Trust Co., 399 U.S. 306 (1950).] An argument can be made that service by nail [posting] is not reasonably calculated to apprise parties of the suit.[24]

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22 See n.17 supra.

23 JOAN G. BRANNON (N.C. Inst. of Gov't, 3d ed. 1980) at 23.

24 Amicus is informed by North Carolina Legal Services attorneys that

In Pennsylvania, the state statute clearly sanctions posting;[25] however, Rule 506 of the RULES OF CIV. PROC. FOR JUSTICES OF THE PEACE (the court where virtually all evictions take place) and Rule 107 of the RULES OF PHILADELPHIA MUN. CT. both mandate first class mailing along with posting.[26]

Appellants argue that "'posting' is used as a method of service only as a last resort after personal and substituted service have been attempted and failed."[27] What at first appears to be an elegant and fair-handed procedure upon closer scrutiny is really nothing

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the precautionary use of mailing along with posting is widespread.

25 See n.17.

26 Amicus is informed by Pennsylvania Legal Services attorneys that mailing is employed statewide in all eviction actions where posting has been used to effect service of process.

27 Appellants' Brief at 7.

more than a "one stop" fast service procedure with tenants as the ultimate victims. A process server, even with good intentions, can satisfy the Kentucky statutory requirements of first attempting to serve personally, second, attempting to serve by substitution, and finally serving by posting,[28] by merely tacking the relevant papers to the tenant's door and leaving. The hammering or tacking is a substitute for a knock, and if no one answers by the time the papers are nailed to the door, the process server probably feels justified in stating that he has attempted personal or substituted service, but that no one was at home.

All that Appellees request of the process server is that when he returns to his office after posting notice, he simply mail a copy to the tenant at the

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28 Appellants' Brief at 7.

premises he has just left or at any other more current address he may have. This single additional ministerial function takes but a few seconds and for the present costs only 20 cents. Can we say that this minimal and basic due process safeguard is not worth the price?

II. DUE PROCESS OF LAW DOES NOT PROHIBIT POSTING AS A METHOD OF SERVICE OF PROCESS, BUT DOES REQUIRE MAILING ALONG WITH POSTING WHEN THE ADDRESS OF A PARTY IS KNOWN.

Appellants would have this Court believe that "the test under the Due Process Clause to the validity of notice is . . . whether the method used is one reasonably calculated to give notice."[29] The correct test pursuant to Mullane, supra, is that the method of service be "reasonably certain to inform those affected [and] . . . that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."[30]

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29 Appellants' Brief at 10, paraphrasing Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314-315 (1950).

30 Mullane at 314-315.

(Emphasis added.) The two prongs of the Mullane test, "reasonably certain" and "not substantially less likely," are a far cry from Appellants' selected test of "reasonably calculated."

Further conjecture about the nature and extent of the Mullane due process test as applied to the case sub judice is unnecessary. The Mullane court spoke directly to our factual circumstances:

> Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

Mullane at 318, emphasis added.

It can be argued that posting process on the door of a tenant's home is "reasonably calculated" to actually reach

and notify the tenant of a pending proceeding; however, it cannot be seriously argued that posting is "reasonably certain" or even equally likely to notify the tenant as is mailing when the tenant's name and address are known or readily available to the process server and diligent attempts at personal or substituted service have failed. In fact, the process server would be better advised after unsuccessfully attempting personal or substituted service to not leave his office again and waste the time and money required in a posting operation when he could simply use the first class mails to notify tenants of pending proceedings. "However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication." Mullane at 319.

Appellants' concern with "having landlord-tenant disputes settled rapidly and peacefully" and therefore "having tenants served rapidly"[31] is ill served by posting rather than mailing. Additionally, Appellants' preoccupation with speed and rapidity[32] must be tempered by this Court's admonition in Pernell v. Southall Realty, 416 U.S. 363, 385 (1974), upholding the right to a trial by jury in District of Columbia summary evictions proceedings:

> Some delay, of course, is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords

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31 Appellants' Brief at 11, citing Lindsey v. Normet, 405 U.S. 36, 72, 73 (1972).

32 Id. at 10, 11 and 12.

seeking to evict their their tenants, but rather to see that justice be done before a man is evicted from his home.

CONCLUSION

The foregoing survey of state law shows that mailing process after unsuccessful diligent attempts at personal and substituted service is the enlightened trend among an increasing majority of states. Posting simply does not take into account the realities of modern urban life, particularly life in public housing among the poor. A legal notice nailed or tacked to the door of a rental unit in public housing has little or no chance of reaching the tenant occupant intact, or for that matter, at all.

Process servers are certainly put in an uncomfortable situation when they are

required to nail a legal notice to a tenant's door on the third floor of a high-rise public housing project. Frankly, there is some doubt about whether such posting ever truly takes place; hence, the common phrase "sewer service" has been used in an increasing number of recent cases and newspaper accounts of the judicial process.

Use of first class mail in place of or certainly in conjunction with posting is better calculated and substantially more likely to actually reach a party-defendant than any other method of service with the exception of personal or substituted service. The burden of mailing does fall on the plaintiff in eviction actions; however, when balanced against the repercussions of no notice to the tenant, the scales tip dramatically in favor of addressing and stuffing an envelope and affixing a 20-cent

stamp to it and depositing it in a mail box. It must be remembered that the tenant's home is at stake in this proceeding and therefore every reasonable opportunity must be given the tenant to appear in court and respond to the charges which form the basis for the eviction.

Amicus has represented tenants in evictions for over 13 years. For the tenant, eviction is always traumatic. However, an eviction where the tenant has never received notice of and does not know anything about the proceeding until a law officer shows up with a writ and threatens to or actually does put the tenant out on the street is terribly

frightening. A mailing requirement will go a long way toward alleviating this problem and satisfying the minimum requirements of due process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify three (3) copies of Amicus Curiae Brief were served upon the following individuals by placing these documents in the United States Mail, postage prepaid, to William L. Hoge, III, Esq., Assistant Jefferson County Attorney, 1112 Kentucky Home Life Building, Louisville, Kentucky 40202; Ms. Gail Leeco, Attorney General's Office, Commonwealth of Kentucky, New Capitol Annex, Frankfort, Kentucky 40601; and Robert Frederick Smith and Barry L. Master, Legal Aid Society, Inc., 425 West Muhammad Ali Boulevard, Louisville, Kentucky 40202.

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Dated: December 30, 1981